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Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 821

THOMAS D. AIKEN, ET AL.,
Plaintiffs-Petitioners,

vs.

SAMUEL INSULL, JR., ET AL.,
Defendants-Respondents.

REPLY BY PETITIONERS TO RESPONDENTS ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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REPLY BY PETITIONER TO RESPONDENTS ANSWER TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

MAY IT PLEASE THIS HONORABLE COURT:

FOREWORD.

We humbly apologize for the length of this Reply and beg the Court to consider as extenuating circumstances: (a) the nature of the case and the responsibilities thereof, (b) respondents' distortion of the facts, issues and law necessitating an extensive reply, (c) the shortness of time for condensation, and (d) the possibility that this comprehensive treatment may serve the Court's convenience.

Respondents Attempt to Obfuscate the Facts in This Case and to Escape Equity and Justice.

The Answer of the respondents to the Petition for a Writ of Certiorari is an attempt to obliterate the simple facts in this case, and the simple common sense principles of law and equity which apply thereto.

Respondents seek to re-establish in Illinois legal legerdemain, a false and vicious doctrine of releasing people of the grossest wrongdoing, a cancerous growth, that has long ago been completely eradicated from this state and from every other enlightened jurisdiction in the United States.

The lower court failed to recognize the crucial facts and the present living law of Illinois, and also failed to recognize that *this is a suit in equity in a court of equity;* that it is an *appeal to* the *common sense* and to the conscience of a Court of Equity by over seventeen thousand defrauded debenture holders all over the United States, who *seek equitable relief* and redress, for losses they sustained through the wrongdoings of the respondents, directors in Insull Utility Investments, Inc.

Respondents accuse all the debenture holders of having "released" respondent directors of all rights of action for accounting.

This accusation is supported only by,—(a) distorting and befogging the admitted facts in this case, and (b) by applying legal legerdemain. They now spuriously contend that in some *unintented* or "meaningless" manner a "release" was accomplished for such wrongdoers.

On the facts, our simple answer is:

No such thing happened,—

There was no release of the directors of I. U. I. The transaction with the banks did not release anybody. It only restrained the debenture holders from suing the banks

further, which was in the nature of an effective covenant not to sue.

There was neither intent nor motive in any one of the thousands of investors who lost all their money to release the directors and thereby throw away any or every opportunity to recover all that was possible from any and every wrongdoer who caused them $53,000,000 in loss.

The intention was exactly to the contrary.

Respondents' assertion is preposterous. *It is exactly contrary to the truth* and understanding of the parties, and to their own agreement with the banks *not* to release the directors of I. U. I.

THE FACTS.

To clarify the situation, we briefly review, summarize and comment on the salient admitted facts in this case.

The facts in this case consist of the allegations in the *Bill of Complaint,* and in the statements and averments of fact contained in the *"Answer on the Facts"* (R. 229-268) filed by the petitioners (plaintiffs) in opposition to the Motion for Summary Judgment and *the evidence,* relating to the agreement of settlement and all the other written and oral evidence stated and referred to in such Answer, which plaintiffs offered to introduce (R. 230-231, 239, 264).

The plaintiffs (petitioners herein), offered to produce in Court all of the evidence, written, oral and documentary, and the persons having personal knowledge of the facts to prove every allegation in the Bill of Complaint and in the Answer on the Facts (R. 239).

At the hearing of the Motion for Summary Judgment, when plaintiffs again requested an opportunity to introduce the evidence, Mr. Thompson, attorney for respondents said (R. 279):

> "I have just filed a motion (to strike plaintiffs' Answer on the Facts) eliminating all questions of fact, because, we in that motion, in effect admit the facts alleged or averred." * * * (R. 288.) * * * "We demurred to it, and we filed a motion to strike it. There is no dispute of those facts."

The Court rejected all of this evidence as immaterial (R. 288, 289) and incompetent (R. 290, 291).

From the admitted facts in the record it therefore appears, without any dispute:

DEBENTURE HOLDERS DID NOT RELEASE OR INTEND TO RELEASE RESPONDENTS.

1. *No debenture holder* (or representative of such debenture holder) *ever signed a release to anybody for anything.* (R. 237, pars. 47, 48-49; R. 241, par. 60.)

2. Judge Wilkerson, the banks and the debenture holders **intended not to release or affect any causes** of action against the respondents, but expressly reserved them.

3. *No debenture holder* (or representative) *ever signed, executed or delivered any release, acquittance, covenant, accord, satisfaction or other document or paper* in connection with the bank settlement.* (R. 241-60, Offer of Proof; R. 239, par. 56.)

4. The *terms and conditions* of settlement, set out in the statement sent to debenture holders included the Reservation of all rights of action against the respondent directors (R. 159, Clause K), as follows:

Reservation.

> "(K) Nothing in the settlement shall be construed to *operate as a release or to effect any claims* against any person, firm or corporation other than a party to said settlement by name or reference and any officer, director, agent or employe of such party who is not or has not also been an officer or director of said Insull Utility Investments, Inc."

* Except, that over 51% of the debenture holders signed a form of Acceptance (R. 153; 170, par. 33) of the proposed bank settlement, after receiving from the Receiver appointed by the Court, a Notice and statement (R. 155-162) of the *terms and conditions* of such proposed settlement.

No Intention to Release Anybody.

5. **There never was any intention in fact by any debenture holder—to release the respondent directors** or the banks, or anybody of anything. (R. 241, par. 60; R. 230-268, Plaintiffs' Answer on the Facts to Motion for Summary Judgment; R. 237, par. 47-49; Offer of Proof, R. 239, par. 56.)

The Reservation Was a Condition of the Settlement. It Was Relied on by Debenture Holders.

6. **The Reservation** of all actions against the directors of I. U. I. **was an integral part and condition** upon which the bank settlement was made. (R. 238, par. 52; Offer of Proof, R. 239, par. 56.)

7. **The Reservation was relied on by** plaintiffs (petitioners here), and **all other debenture holders,** and **but for such reservation no settlement would have been made.** (R. 238, par. 3; R. 230-268; Offer of Proof, R. 239, par. 56.)

Respondents Admit That Debenture Holders Did Not Intend to Release the Directors.

8. Respondents *admitted* (R. 289):

> "Mr. Thompson (Attorney for Respondents): We admit that they did not intend to release the cause of action against the directors."

9. **There was no release or accord and satisfaction** of any cause of action set forth in the **complaint in this suit,** (R. 230), sub-par. (e), and then pending and active in the same U. S. District Court (R. 59-62), where the bank settlement proceeding was pending (R. 86-148).

Debenture Holders Recovered Only 7½% of Their Losses.

10. The plaintiffs (petitioners) and the other 17,000 *debenture holders recovered only 3½ cents* on the dollar through dividends in bankruptcy *and 4 cents* from a fund raised by the settling banks. They recovered nothing else. They lost over $53,000,000. (R. 239, par. 57; R. 241, par. 241; R. 230-268.)

THE ACTUAL AGREEMENT OF SETTLEMENT WITH THE BANKS MADE BY THE PARTIES DID NOT INTEND TO RELEASE THE DIRECTORS, BUT INTENDED TO RESERVE ALL ACTIONS AGAINST THE DIRECTORS.

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11. **The agreement of settlement was partly written and partly oral.** The Decree of Judge Wilkerson was only one step in its Performance. The *Agreement* is set forth more fully in Answer on the Facts (R. 235-268; the offer of proof, oral and written, concerning it appears in R. 239, par. 56). The agreement is described: (a) In the Petition for Decretal Order Approving Settlement and Compromise, Etc., filed August 13, 1937 (R. 115-148, at pages 137-145, Par. 26, A to L, the reservation is Clause K thereof, and appears at p. 143); (b) in the Order of Court entered on such Petition (R. 148-162), which incorporates the Notice to be given to all debenture holders (R. 157-162). (c) The substance of the Agreement is described in R. 157, *et seq.*, and the reservation Clause K as set out in said notice appears at R. 159. This reservation appears in our statement of facts, *supra.* (d) The Agreement also is set out in the Findings of Fact made by Judge Wilkerson (R. 166-170), including the reservation Clause K at page 166; the agreement is also referred to in the Decree

made by Judge Wilkerson (R. 172-174), which refers to the "compromise and settlement agreement set forth in Paragraph 26 of said Petition" (of which Clause K is a part). The evidence submitted was referred to by Judge Wilkerson in his Decree of Settlement (R. 172).

12. **The Agreement of Settlement was the result of negotiations** which lasted over one year. There were many specified suits, many parties, many phases, many claims and many conditions to be considered, agreed upon, arranged for and disposed of (R. 136, 137, Par. 25, 26, R. 115, 145).

BANKS INTENDED TO BUY PEACE ONLY FOR THEMSELVES.

13. The **intent and purpose of the banks** who were parties to agreement was, that, although they believed that they were blameless, they wished and **intended to buy their peace** (R. 236, par. 42), and desired to obtain something **in the nature of a covenant not to sue** (R. 233-239), namely, an order, injunction or decree of some court (R. 233), (R. 172, 177) **to bar and restrain the further prosecution of any litigation with such banks only**, (in the hope that such injunction would be practically so effective), against all the 17,000 debenture holders; most of whom were not even represented in that court. (Only $10,000,000 approximately out of the $57,000,000 were represented in court by various committees (R. 127).) It was difficult or impossible to reach all of them and obtain formal covenants not to sue from all of them.

17,000 Debenture Holders Never Heard of Any Intent to Release the Directors,—But They Heard Exactly to the Contrary.

14. **None of the 17,000 debenture holders** (as appears from the record) **ever heard of any intent** or purpose **to release the directors. They were informed just to the contrary.** The first notice to the debenture holders all over the United States appears in the notice issued by the receiver pursuant to the order of court (R. 155-162). More than 23,000 printed notices were mailed under the direction of the Receiver (R. 169, Par. 29). This **notice described the settlement agreement and the reservation** clause referred to.

Letter of Explanation to Debenture Holders—All Suits Against Directors to Proceed.

15. On August 31, 1937, when the Petition for Decretal Order to Approve the Settlement with the banks was filed in Court, and before the settlement with the banks was consummated by a decree, the Insull Protective Committee caused to be mailed to each of its members, over 1400, a letter (R. 238, Par. 54) which is as follows:

(Letter Head of Committee.)

"SUIT AGAINST DIRECTORS AND PARTIAL RECOVERY TO DATE."

"2. In addition to the above litigation, (proposed to be settled against the banks), *our counsel have also been prosecuting a suit against the directors of Insull Utilities Investments, Inc.*, for wrongful declaration of dividends, *breach of debenture covenants*, waste, etc. *This suit is not affected by the settlement* described in Paragraph 1 (of this letter). * * * *Our counsel* * * * *are prosecuting the suit against the other nine directors.*" (R. 268-269.) (Interpolations are ours.)

NEITHER JUDGE WILKERSON OR HIS DECREE RELEASED OR INTENDED TO RELEASE THE DIRECTORS.

16. Judge Wilkerson conducted the bank settlement proceedings and made the Decree in that case (R. 172, 174), and in the Bankruptcy case (R. 195). Acting as such court, he:

(a) made **Findings** that the (parol) **agreement of settlement** (which was submitted to the Court (R. 172)), (R. 137, par. 26 to page 145), set forth in the Petition for a Decretal Order to Approve the Settlement (R. 115-148) **including the Reservation Clause K** (R. 166) "was fair, just and equitable" (R. 170, par. 34).

(b) The Court decreed (based on the *evidence then submitted to* him), that "the **settlement agreement** set forth in Paragraph 26 of the Petition" (for Decretal Order), **which includes Clause K as part thereof,** (R. 137, Par. 26, Clause K at page 143), is fair, just and equitable, and

"the complainants (*Kelly, et al.* v. *Banks*), as representatives of the class (for all debenture holders, interpolations are ours), * * * are hereby authorized and directed to enter into and make said settlement and compromise **on the terms set forth in said petition and to carry said agreement for settlement and compromise** into effect, and **to perform the terms and conditions thereof,**" * * * etc.

(c) The Court then decreed an INJUNCTION.

"Until the further order of this Court **all holders and owners** of said Series A and Series B Debentures of Insull Utility Investments, Inc. and said Bigelow, as Trustee, **are hereby enjoined and restrained from instituting or prosecuting any suits at law or in equity against** * * * (named banks)

"and the claims of such Debenture holders **against said Banks**, are limited to said settlement fund, and

upon the payment by said Banks of said settlement fund to said Receiver, all such **holders and owners of said Debentures** and said Bigelow, as Trustee, **are hereby permanently enjoined and restrained from instituting or prosecuting any such suits at law or in equity.**" (Against such banks. Interpolations are ours).

NOT A WORD IN COURT PAPERS TO JUSTIFY CONTENTION THAT A RELEASE OF DIRECTORS WAS DECREED OR INTENDED.

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17. *There is not one word in the entire settlement proceeding* to indicate the slightest intention to release any director from anything. Even counsel for respondents admitted in the District Court (R. 289):

> "The Court: Your position is that these facts (contained in the Answer on the Facts, R. 230-268) are unimportant?
>
> "Mr. Thompson: Yes, we have demurred to that Answer, so the question stands here with those facts admitted for whatever they are worth. We admit they did not intend to release the cause of action against the directors, and in accordance to what they say there they didn't * * *."

In this Court, counsel for respondents, in their Answer to Petition for Writ of Certiorari, say at page 7, point 7:

> "It is immaterial that the settling debenture holders who petitioned for the decree intended to release only the banks."

There is not one word in the Petition for Decretal Order Approving Settlement with the Banks filed August 13, 1937 (R. 115); in the Order to notify the creditors of the proposed settlement (R. 148); in the Notice directed to be sent to the debenture holders by the court (R. 155); in

the Answer filed October 20, 1937 by the Continental Bank and other banks, defendants in the litigation settled (R. 162); in the Findings of Fact and conclusions of law entered by Judge Wilkerson on November 4, 1937 (R. 166); in the Decree aproving the settlement entered by Judge Wilkerson on November 4, 1937 (R. 172); or in *any other Order* confirming the settlement, to the effect that the directors were intended or should be in any manner released. There is not a single expression in the entire Petition for Decretal Order approving the settlement that even hints that the plaintiffs (petitioners) contracted with any other person *except the banks* to refrain from further prosecuting anybody *but* the banks, Judge Briggle to the contrary (R. 293) notwithstanding.

RESERVATION OF ALL RIGHTS OF ACTION IS CLEARLY INTENDED, AGREED TO AND EXPRESSED IN COURT DOCUMENTS AND DECREE.

18. On the contrary, the **reservation of the rights of all causes of action,** claims or demands **against the directors was fully set out in the Petition for Decretal Order** (Clause K, R. 143). It was fully **described in the Notice** given to the debenture holders, (Clause K, R. 159). It was fully set out in the **Findings of Fact** made by Judge Wilkerson (R. 211) and was referred to in the **Decree and Order confirming** the Settlement dated February 24, 1938 (R. 174).

Decree of Judge Wilkerson Did Not Order Debenture Holders to Execute a Release or to Release Anybody of Anything. It Only Enjoined Further Suits.

19. If Judge Wilkerson or the District Court in the bank proceeding intended to release the directors from any cause of action he **would** have so provided in his decree. He provided **exactly to the contrary.**

20. The District Court in 1937, in the bank settlement proceeding or decree **did not order or direct the debenture holders to do anything**, except to refrain from suing the banks further.

The Respondent Directors Knew That They Were Not Released or Intended to Be Released. They Cannot Complain of the Decree or Its Intent to Carry Out the Settlement Agreement Made by the Parties.

22. They knew the settlement agreement was being made and refused to participate in it (R. 230-241).

Respondents did attempt to get the benefit of the negotiations for settlement with the banks, but their proposals were rejected because they did not add substantially to the fund (R. 236-237, 242).

The notices of the hearing of the proposed bank settlement were widely published in newspapers. Evidence was taken before Judge Wilkerson concerning the settlement agreement and the decree so recites (R. 172).

They did not complain—no one filed objections to the decree (R. 172). They sat by. (*Mo. Pac. R. R. Co.* v. *Texas & Pac. Ry. Co.*, 282 Fed. 61.)

This estops them from complaining. *Oliver* v. *Ross*, 289 Ill. 624, 640 (Floyd E. Thompson, Judge). Such silence has a fraudulent effect on the debenture holders. *Milligan* v. *Miller*, 253 Ill. 511.

Judge Briggle Acted Erroneously in Granting Summary Judgment.

March 8, 1940, Judge Briggle entered the erroneous judgment appealed from on a motion for summary judgment. (R. 320).

He erroneously overruled the objections of plaintiffs (petitioners) to the motion for summary judgment and to proceeding under Rule 56, and struck the Answer on the Facts which they filed in opposition to such motion (R. 224-268), and denied a trial by jury, which had been demanded (R. 277). He rejected and refused to hear proper, uncontradicted, evidence then offered, and also presented in the Answer on the Facts, filed by plaintiffs (petitioners), which would have dispelled any doubts concerning (a) the decree, (b) the reservation of causes of action therein, and (c) the reservation that the respondents were not to be released or affected, and (d) concerning the bank settlement proceeding, and (e) the intent, purpose, meaning, understanding and (f) the agreement of the banks and the debenture holders which was effectuated by such decree.

The District Court's holding was exactly contrary to the language of the reservation, and exactly contrary to the evidence of the actual and admitted intent of all the parties to the agreement, and to the intent and purpose of the agreement itself, and contrary to the intent and purpose of the court proceedings, and to the intent and purpose of the consent decree of Judge Wilkerson in the bank settlement proceeding.

The District Court read *into* Judge Wilkerson's decree something which it expressly provided *against* in that decree.

The lower court erroneously *rejected* as "incompetent"

(R. 290, last line, and R. 291), all *evidence written and oral of all the parties to the transaction* (R. 230-268):

(a) Of the *entire agreement* of settlement (of which the *decree* was *only a part*), and the evidence concerning it submitted to Judge Wilkerson, and which he referred to in his decree;

(b) *concerning the intent* of all such parties not to release any director;

(c) their *meaning and understanding* of the *reservation* they made not to release or affect the liabilities of the wrong-doing directors, and

(d) the *circumstances surrounding* the transaction, the situation of the parties, their purpose and meaning, and

(e) the *interpretation and performance* of the parties themselves, under such arrangement,

all of which are vital in construing any agreement in equity, as well as in law.

District Court Erroneously Interpolated New Terms Into the Decree—Contrary to the Uncontradicted Evidence as to the Actual Agreement of the Parties.

Thereupon the District Court, in this case, after making the completely unwarranted assertions about the agreement, the petition and the intent of the parties which were exactly contary to the facts, and exactly contrary to the admissions of the attorney for the respondents made to him in open court (please see *supra*, and R. 289), Judge Briggle then interpolated his *own language* into the Reservation (which we quote, *supra*), and which was made in the settlement agreement, also in the Petition for Decretal Order and in the Findings of Fact and on which the decree was entered by the consent of all the parties to the transaction in the bank settlement case.

Judge Briggle interpolated and added to the Reservation the following words: "*but (the agreement) is to be con-*

strued as a release and settlement of the cause of action against the parties hereto." (R. 293).

With such spurious addition, the lower court in this case held that the reservation (of the causes of action against the respondent directors), became "meaningless and repugnant."

The **reservation was a condition** precedent to the settlement. It meant the possible recovery of $53,000,000 against the directors for their wrongdoings. **But for such reservation the settlement would not have been made by the debenture holders.** But for such reservation **the settlement** with the banks **would not have been "fair, just or equitable"** as found by Judge Wilkerson. **The debenture holders relied on such reservation.** The reservation **was not repugnant to them.** It was **vital to them** to have such reservation made.

17,000 debenture holders who lost $53,000,000 relied on it and acted under it.

We do not concede that the Reservation (Clause K.) is in any wise doubtful or meaningless to the parties to that arrangement or to Judge Wilkerson who found as a fact what the agreement and reservation therein were, and entered a decree in accordance therewith, and approved both the agreement and the reservation as "fair, just and equitable."

PREPOSTEROUS TO BELIEVE THAT THE DEBENTURE HOLDERS INTENDED TO THROW AWAY MOST IMPORTANT RIGHTS.

It is just *plain common sense* to realize that the intent of the losers of $53,000,000 was *not to release* any wrongdoers until every possible *effort was exhausted* to bring to justice every wrongdoer who caused them to lose their money, and to obtain relief. Such litigation was then pend-

ing against the respondent directors when the bank settlement was made in 1937.

It is wholly improper to assume that Judge Wilkerson would have found as a fact or approved anything to be "fair, just and equitable," if he did not understand the meaning of either the agreement or of the reservation.

It is wholly improper to assume (as did Judge Briggle) that if the intent of the parties was *not* to prosecute the directors further—then he, Judge Wilkerson, would have ordered to be dismissed this very suit that was then pending and active in his Court.

History of I. U. I. and Relations Assumed by Directors to the Public Whose Trust They Induced.

To clarify other essential facts as bearing on the nature of respondent's liabilities, (and to correct the inaccurate and misleading statements in respondents' Answer and brief), we briefly submit the following uncontroverted facts, (Parenthetical interpolations are ours):

I. U. I. Sold Debentures to Public Immediately Upon Incorporation, $66,000,000 Total Within One Year.

The facts stated in the complaint (R. 2-39), and admitted to be true, (R. 289), are that Insull Utility Investments, Inc. was incorporated December 27, 1928 by Samuel Insull and his close associates, who were the respondents and the other directors (R. 3, par. 5). About January 1, 1929 (within 4 days) there were issued $6,000,000 Series A Debentures (R. 6, par. 11).

January 11, 1929 (14 days after incorporation) the Series A Debentures was duly authorized and directed by the respondents to be sold to investors (R. 6, par. 11-12).

About January 1, 1930, a year later, the respondents authorized and the company issued and sold $60,000,000

Series B Debentures (R. 11, par. 12-13) making a total of $66,000,000. (Some debenture holders exercised stock conversion warrants, reducing the total outstanding to approximately $57,000,000. Nothing was recovered for stockholders in the bankruptcy.)

Respondents Represented I. U. I. to Be an Unusual Investment Trust Type to Permanently Hold and Control the Selected Insull Stocks.

When Insull Utility Investments, Inc. was organized, its *real objects and permanent policy* was proclaimed by Insull, with the knowledge of respondent directors (R. 3, par. 5) * * *

"* * * In the interest of the various properties, there should be some rallying point (Insull control) ownership and friendship (R. 3, par. 5). * * * *An investment company, to buy and hold* securities of several companies with which my name is associated * * * (R. 4).

"* * * I wanted it *for all time* to be interested in the properties that it has been my privilege either to create, improve or develop * * * and I thought I could trust its Board of Directors * * *" (R. 4, par. 2).

"* * * more than 90% of their holdings are in the 5 major Insull group utilities * * *" (R. 4, par. 3).

"*The company is fundamentally an investment company and not a trading company.* It has an *unusual status in the investment field* (R. 4, par. 4).

It is perhaps the only corporation of its kind which has *holdings almost entirely limited* to properties under the direction and management of its own directors * * * (R. 4, par. 4).

Respondents and Other Directors, in Effect, Held Themselves Out as Trustees for the Security of Investors. They Pledged Their Personal Interest as Financiers and as Trusted Operators and Managers to Protect the Debentures Whose Purchase They Induced.

The directors were publicly represented (with their knowledge and approval), (R. 3-5, par. 5-7), as closely associated in the management, operation or financing who could be *trusted with the name "Insull"* (R. 4, par. 2).

> "The directors (respondents), are men who know the earning value of the securities (I. U. I.) they *buy for investment* * * * (R. 4, par. 4).
>
> "* * * The men who have made successes of the Insull properties are the *very men who are responsible for the management of* * * * (I. U. I.) (R. 4, par. 4).
>
> "The *men who control these investments* (of I. U. I.) have large personal financial interests and have pledged their experience and ability as *financiers, managers and operators*" etc. (R. 5).

Respondents Induced the Public to Invest $66,000,000 in Safe and Secured Debentures (Bonds).

The respondents and other directors of Insull Utility Investments, Inc. induced over 20,000 people all over the United States to invest in $66,000,000 of Debentures (R. 91, par. 10) on representations (by over a million Circular Prospectuses, newspaper advertisements in over 300 cities, and by brokers and solicitors) (R. 256, 257), that these debentures or bonds were safe (R. 258, par. 121), that over $160,000,000 of assets were security and were safeguarded by respondents and the other directors whose names were put in bold type in the circulars (R. 258, par. 121).

The circulars and advertisements (R. 91-93) made no mention of a "No Recourse" escape for directors who violated the debenture covenants (R. 256-260).

The no recourse clause was buried in indistinguishable fine print in a huge debenture, 15 x 22, embellished with scrolls, insignia, seals and "GOLD" letters written 2½ inches high over it, to look like a bond and was folded and refolded to expose only 1/9th of its surface. None of these debenture certificates was delivered until many months after the investor had parted with his money. Debenture holders knew nothing about such "No Recourse" clauses (R. 258-259).

The debentures, also as advertised, contained various *protective covenants against pledging* the assets, increasing the debts, and limiting the payment of dividends (R. 12-15).

Respondents Wrongfully Pledged All the Assets, and Debenture Holders Lost Practically All.

The same respondents and directors soon thereafter, in violation of the covenants, *engaged in a series of wrongdoings, including the pledging of practically all of the* assets of I. U. I. for forbidden loans (R. 24, 32-33), and thereby such assets worth over $193,000,000 were lost (R. 32, par. 31).

Loans Not in Usual Course for Less Than One Year.

The company had no usual course of business which required borrowing large sums (R. 33, par. 38) and no usual course of business (*not a trading company* (R. 4)), (Respondent's answer here to the contrary, notwithstanding), which would enable it to pay off large loans; the loans made were not in the usual course of business (R. 33, par. 38).

The loans made from the banks were not for periods of less than one year (R. 33, par. 39, R. 24-32). None of

the pledges were made to secure the purchase price of property so pledged (R. 32, par. 33).

What followed in 1932, was bankruptcy of the company and total loss for the debenture holders except a dividend of 3½%.

Over fifteen thousand debenture holders *filed their claims and debentures* in the bankruptcy court proceeding within 6 months in 1933 as required by the bankruptcy court (R. 240). *That is the last they saw of the debentures.* They made no indorsements on them.

Paper Claims Worthless.

The withdrawn claims for deficiencies by the banks, and the other huge paper claims so quickly erased from the bankruptcy court—were mainly by *I. U. I.* v. *Corp. Sec.* and vice versa, (Middle West and other dead corporations), and other claims which it was considered a waste of time and effort to do anything else but erase. There is no evidence in the record that any bank paid 1¢ to have any such claim withdrawn, or that any debenture holder received 1¢ compensation out of it for his losses.

Duty of Judge Briggle to Protect Agreement of 17,000 Debenture Holders, Wards of the Court.

If anything in any document or decree was "meaningless" to Judge Briggle, in 1940, it was his duty as a *chancellor* to protect the important rights of so many thousands of people, in and out of court, by giving them the opportunity they demanded to submit evidence which they offered. It was his duty to obtain and receive all pertinent evidence which might explain and sustain if possible the agreement for the settlement, the decree of Judge Wilkerson and the reservation he made, as meaningful and effective.

* * * * *

The Bank Settlement Was Conditioned on the Reservation.

From the foregoing analysis it conclusively appears that the settlement was contingent on the preservation of the liability of the defendant-directors; that this condition was an inducement for the acceptance of the settlement by the debenture holders and for its approval by the court; that it is absurd to assume that Judge Wilkerson and the settling parties intended to rely on a meaningless reservation; that it is apparent that Judge Wilkerson and the settling parties treated it as valid and effective, that is, that under the established law of Illinois the agreement for settlement, the petition, findings and reservation and decree of injunction restraining suits against the parties accomplished at most what an ordinary covenant not to sue could accomplish—never a release. (The authorities are cited and discussed later.)

LOWER COURTS MISAPPLIED LAW OF ILLINOIS BUT IT APPLIED UNJUST, HARSH AND DISCARDED ANCIENT COMMON LAW TECHNICALITIES.

The District Court disregarded the fact that this was a *cause in equity*, before *a court of equity*, and by applying *harsh, unjust, unsound and ancient common law technical rules* erroneously held that the debenture holders had released the respondents of all liability for their wrongdoing and of all the losses they caused.

The Circuit Court of Appeals (although admitting this ancient common law rule to be "*harsh*" and "*technical*"), misapprehended the principles of law and equity prevailing in the State of Illinois, and affirmed the judgment.

Respondents' Acts Were Deliberate and Gross Injury to Debenture Holders.

Defendants suggest, page 34, that in causing the wrongful pledges to be made, there was a complete absence of motive for wrongdoing. There is no evidence in the record to show the faintest tinge of innocence or good faith. Well, why did they not in six years answer the complaint and submit to a trial on the merits, where the deliberate and malicious character of their wrongdoing as charged in the complaint could be proven as charged? While debenture holders were engaged in years of litigation against gigantic corporations (R. 309; Answer on Facts 229-268) defendants in this case engaged in multitudinous defensive obstructive delaying and harrassing tactics (R. 43, 46, 56, 57, 59, 60-62, 66-206). But they *never* answered the charges of the Bill of Complaint. They never submitted to a trial on the merits.

On the contrary, having admitted the charges in the complaint, it does convincingly appear in the Record (R. 2-39) that they used practically all the assets of the company to make personal profits, to engage in marketing operations, to rigging, switching or pledging assets, to pay dividends improperly, to deliberately squander and dissipate the assets on their own schemes and on the schemes of their mighty associate who fled this country when the bubble burst. (Reports of Senate Committee *re* "Insull", 1933-1934.)

The Summary Judgment brought escape to the respondents for their wrongdoing, and an unearned windfall from the Court,—a result contrary to every principle of justice and equity.

In a court of equity respondents should not be permitted to escape so gross a betrayal of trust.

The result just doesn't make common sense.

EQUITY AND LAW.

I.

THE LOWER COURT HAS MISAPPREHENDED AND MISAPPLIED THE CONTROLLING PRINCIPLES OF LAW AND THE FUNDAMENTAL DOCTRINES OF EQUITY AS THEY ARE ESTABLISHED IN ILLINOIS.

In Illinois the following principles have been established:

(a) Courts of equity will do equity and justice according to common sense and fair dealing. They will disregard super-critical, harsh and unjust technicalities and artifices which are contrary to justice.

(b) Equity looks to the substance and not the form.

(c) The intent of the parties to the entire transaction and the entire agreement must control all papers, documents, deeds, conveyances, decrees (and especially consent decrees), which were a part thereof.

(d) It is reversible error to refuse evidence, written or oral, of the circumstances surrounding the entire transaction and of the intent, meaning and understanding of the parties to such transaction and their own interpretation and performance under it, so that the true meaning and intent shall always prevail.

Wigmore on Evidence (3rd Ed.) pp. 97-99 "Integration," Secs. 2430, 2431.

Guhl v. *Guhl*, 376 Ill. 127, 133.

Ludeke v. *Sutherland*, 87 Ill. 481, 482.

Todd v. *Todd*, 159 Ill. 408.

Trapp v. *Gordon*, 366 Ill. 102, 110.

Collins v. *Phillips*, 259 Ill. 405, 411.

Scholbe v. *Schuchart*, 292 Ill. 529, 534.

Chicago Daily News Co. v. *Kohler,* 360 Ill. 351, 364.
Air Conditioning Co. v. *Honaker,* 296 Ill. App. 221, 225.
Reams v. *Janoski,* 268 Ill. App. 8.
Lane & Co. v. *Western Union Telegraph Co.,* 149 Ill. App. 562, 10 R. C. L. p. 1020.
Smith v. *Mayfield,* 163 Ill. 447, 456.
Fuchs v. *Lange & Kittredge,* 242 Ill. 88, 94.
Hedrick v. *Donovan,* 248 Ill. 479.
Haslinger v. *Gabel,* 344 Ill. 354, 367.
McAndrews v. *Mechan. Co.,* 367 Ill. 288, 297.
Vermont Marble Co. v. *Bayne,* 356 Ill. 127.
Koelmel v. *Kaelin,* 374 Ill. 204, 210 (1940).
Platt v. *Aetna Ins. Co.,* 163 Ill. 113.
Gray v. *Schoonmaker,* 30 Fed. Supp. 1019 (1940).
Gordon v. *Brucker,* 208 Ill. App. 208.
Restatement on Contracts, Sec. 208.

In *Todd* v. *Todd,* 159 Ill. 408, a written *release* and an oral understanding concerning the entire transaction was involved.

The court reviewed the evidence and at page 413 said:

> "The decision of the case must turn upon the question of *contract between the parties, independently of the release* (and conveyance). And in this connection we do not regard the point well taken by appellant that what was said and done antecedent to this release rested in negotiation and treaty only, and that the *release and deed must alone be looked to* to *ascertain the contract* between the parties. * * *"

At page 115, the Court said:

> "The written release does not *purport to* be the contract of settlement between the parties. *The contract vested in parol,* and the purpose of the release was to carry into effect *a part of the unwritten contract.*"

And also, the Court said:

> *"It could not,* therefore, be said that the verbal contract between the parties was *merged in the written one,* and that the writing must be looked to as the only evidence of the real contract between the parties. 1 Greenleaf on Evidence, sec. 284; *Platt* v. *Aetna Ins. Co.,* 153 Ill. 113, and cases there cited."
>
> (This case has been followed in every similar Illinois case thereafter.)

In *Trapp* v. *Gordon,* 366 Ill. 102, defendants (purchasers of a part of a tract of land), claimed an *oral agreement* for a perpetual easement 30 foot concrete road, underground service conduits for telephone, light, gas and sewers, etc., *despite terms of sealed instruments* (deeds, conveyances and documents in connection with the transaction), which *disclosed nothing* concerning it. The *deeds limited* the property conveyed by meets and bounds and *expressly omitted* any reference to the perpetual easement.

The Supreme Court reversed this case to require evidence of the entire oral agreement, which it held controlled all the sealed documents, which were part, and the Court said (page 113):

> "* * * the chancellor erred, however, in refusing to allow proof tendered in support of the perpetual easement of a right of way to be introduced in evidence * * * the cause is remanded with directions to accept this proof."

The principle of the case was shown at pages 110-111, where the Court (among other things) said:

> "They (the various transactions, deeds and oral agreements for the easement), were contemporaneous, in that *they were all component parts of and grew out of the same transaction or series of transactions.* While it is the general rule that all prior verbal understandings or agreements with reference to the subject matter become merged in a deed upon its acceptance and the deed constitutes the only contract between the parties which binds them (*Snyder* v.

Griswold, 37 Ill. 216; *Ely* v. *Ely*, 80 id. 532; *Weber* v. *Aluminum Ore Co.*, 304 id. 273); *yet this rule, like many other rules* in the field of law, *is subject to exceptions and qualifications. Where the (oral) contract provides for other acts besides the conveyance, the contract remains in force after the delivery of the deed until it has been fully performed* (*Biewer* v. *Mueller*, 254 Ill. 315; *Platt* v. *Aetna Ins. Co.*, 153 id. 113; *Ludeke* v. *Sutherland*, 87 id. 481)."

And at page 111 the Court said:

"*This is a suit in equity, and courts of equity look to the substance rather than to the form of written instruments, and seek to discover and carry into effect the real intention of the parties,* gleaned * * * from their * * * acts and conduct with reference thereto (*Ogden* v. *Stevens*, 241 Ill. 556)."

In *Vermont Marble Co.* v. *Bayne*, 356 Ill. 127, one of the defendants asserted that the writing he signed using expressly the words: "I hereby *agree to guarantee the amount,*" etc., was indeed a guaranty, and that he was later discharged therefrom.

The Court held (page 133) that although upon its face it was only a guaranty—still the facts and circumstances surrounding the transaction could not be ignored, and

"the promise in which the words appears *is to be construed in the light of the evidence as a whole,*" (citing cases).

That notwithstanding the use of the word "guarantee" (the agreement) must be construed to make him a surety. *The question is one of intention and depends upon the circumstances.* * * *

And at page 134 the Court said:

"Where parties *have adopted a particular construction of doubtful terms* or conditions of a contract this court will follow the construction such parties have themselves placed upon it." *McLean County Coal Co.* v. *City of Bloomington*, 234 Ill. 90.

In *MacAndrews & F. Co.* v. *Mechan. Co.*, 367 Ill. 288 (1937), defendant contended that the final letter of September 19th, and the acceptance thereof did not expressly warrant operation of the machine.

The Court however held that all of the correspondence between the parties and all of the evidence of the surrounding circumstances, objects and purposes involved in the transaction were proper evidence from which it might include in the contract an express warranty.

Recovery was sustained upon such express warranty and the Court at page 297, said:

> "The intention of the parties is to be determined from the language employed, *when read in the light of the context of the instrument and such surrounding circumstances as will aid the court in arriving at the true meaning of the parties.* (*Geithman* v. *Eichler*, 265 Ill. 579; *Goodwillie Co.* v. *Commonwealth Electric Co.*, 241 id. 42; *Druecker* v. *McLaughlin*, 235 id. 367.) In *case of ambiguity we may look to the interpretation which the parties themselves have placed upon the agreement for assistance in determining its true meaning.* (*Storey* v. *Storey*, 125 Ill. 608; *Vermont Street M.E. Church* v. *Brose*, 104 id. 206.) It is also the rule that, where a contract refers to another instrument or to a certain part thereof by specific designation, it is proper that the court know what such provision of the other instrument is."

At page 300 the Court further said:

> "It is a general rule, in the construction of contracts, *that the writing is to be interpreted as a whole,* and *all writings forming a part of the same transaction* are *interpreted together.* * * * (*Chicago Auditorium Ass'n* v. *Fine Arts Building*, 244 Ill. 532; *Geithman* v. *Eichler, supra;* Restatement Law of Contracts, secs. 230-235.)"

In *Platt* v. *Aetna Ins. Co.*, 153 Ill. 113, the Court, in commenting on the parol evidence offered, at page 121, said:

> "Greenleaf, Evidence, Vol. 1, Sec. 284, says that the

> rule does not apply in cases where the original contract was verbal and entire, and a *part, only* was reduced to writing. * * * *'This court has also frequently so held.* (*Ludeke* v. *Sutherland,* 87 Ill. 481; *Laflin* v. *Howe,* 112 id. 253)'." * * *

Wigmore on Evidence (Third Edition) Sec. 2432, refers to some writings as "Memorials which are not *intended as exclusive memorials.—That the extrinsic facts may be shown regardless.* To the same effect are Williston on Contracts, Sec. 632.

Wigmore on Evidence, 3rd Edition, Sec. 2430, pp. 97-99 on "Integration" says:

The answer depends *first on the intent of the parties* * * * and says:

> "This intent must be sought where always intent must be sought (*ante,* Sections 47, 1714, 1740), namely, in *the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice.*"

In discussing receipts and similar documents, Wigmore (Section 2432, page 105) says:

> "It will in generally fall without line of the rule; *i. e.,* it is not intended to be an exclusive memorial, *and the facts may be shown irrespective of the terms of the receipt.*"

The last pronouncement of the rule of construction affecting contracts is contained in *Guhl* v. *Guhl,* 376 Ill. 100 (1941), and the Court at pages 109-110 said:

> "In construing an agreement the rules governing construction and interpretation of contracts generally are applicable. To arrive at a proper conclusion of the terms of a contract, it should be considered in its *entirety to ascertain its general scope or purpose* for out of that will come the *real intention of the parties.* (*Collins* v. *Phillips,* 259 Ill. 405, *Senss* v. *Schuchat, supra.*)"

In *Lyon & Healy* v. *Central Hotel,* 296 Ill. App. 245, 249 (1938) a judgment was confessed on a note and written contract for an organ. The contract also provided that it was "*understood and agreed that no agreement, oral or written, express or implied shall limit or qualify the terms of this contract.*"

The court at page 248 said:

> "The document on which judgment was confessed, and which is the basis of plaintiff's suit, we think *does not represent the entire contract of purchase and sale; if it does, the contract is ambiguous.*"

And at page 249 the Court said:

> "We think the *document is incomplete and ambiguous and therefore parol evidence was admissible to show the terms of the contract.*"

(See our opinion in *Air Conditioning Corp.* v. *Honaker,* 296 Ill. App. 221.)

The court, reviewed the established law of Illinois and following such decisions, held that parol evidence of the entire oral contract was admissible regardless of the written contract which expressly forbade it. (Citing cases.)

In *Hedrick* v. *Donovan,* 248 Ill. 479, in a suit in equity the Court at page 484 said:

> "it is competent by *extrinsic evidence* to show *what the parties, in fact, were contracting about.* This rule frequently is applied, *from necessity.*"

In *Groome* v. *Freyn E. Co.,* 374 Ill. 113 (1940) the Court in considering a contract concerning commissions for sales to the Russian Government, at page 126 said:

> "It is well settled that the construction given by both parties to a contract which might otherwise be doubtful, is entitled to great weight. *Nelson* v. *Colegrove & Co. State Bank,* 354 Ill. 408; *Northern Illinois Coal Corp.* v. *Cryder,* 361 id. 274."

In *Biewer* v. *Mueller,* 254 Ill. 315, the parties orally agreed to exchange various lots, hotels, and improved property.

The Court held that *the entire oral contract remained in force until everything covered by it was performed by the parties* (citing *Laflin* v. *Howe,* 112 Ill. 253; *Platt* v. *Aetna Ins. Co.,* 153 Ill. 113; *Ludeke* v. *Sutherland,* 87 Ill. 481).

In *Ludeke* v. *Sutherland,* 87 Ill. 481, defendant asserted that the *entire verbal agreement could not be shown,* to control the written documents and that all was merged in the deed, notes and mortgage.

The Court in *rejecting* such contention and permitting *all the evidence as to the verbal arrangement,* at page 483 said:

> "The general rule (as to antecedent or contemporaneous parol agreements or declarations), '*does not forbid the establishment by parol of an agreement,* although a deed and notes may have been executed in part performance of such parol agreement.
>
> " 'In such case the verbal agreement remains an integer in full force, and may be proved by parol' * * *. In the case at bar the *deed does not purport to embody the contract of the parties;* it simply conveys the land in question in part fulfillment of the parol agreement * * *.
>
> "*The notes and mortgage do not purport to state the terms of the bargain. They are made, in pursuance of the agreement,* as part performance for the mere purpose of securing part of the purchase money—"

The rule in this case has been approved and reaffirmed in:

Trapp v. *Gordon,* 366 Ill. 102, 110 (1937).
Biewer v. *Mueller,* 254 Ill. 315.
Platt v. *Aetna Insurance Co.,* 153 Ill. 113.
Koelmel v. *Kaelin,* 374 Ill. 209 (1940) and cases cited there.

In *Dillow* v. *Hileman,* 300 Ill. App. 509 (1939), the Court at page 510 said:

> "What was this verbal agreement? The trial court refused to hear evidence of it * * * Where there is a direct reference in writing to verbal agreement, such agreement may be proved by parol evidence even though the *effect be to add material terms and conditions to the writing"* 9 Enc. of Evidence, p. 353, sec. D.

In *Stewart* v. *McIntosh,* 291 Ill. App. 65, the Court at page 77 said:

> *"To give this endorsement the meaning for which plaintiff contends would be to destroy the very purpose for which the trust was created,* as appears from the documents in evidence. * * * Any contrary inference would rest *upon mere speculation* * * *."

In *Smith* v. *Mayfield,* 163 Ill. 447, Mayfield sued to recover commissions for negotiating the sale of certain street car lines.

The Court then at page 454 says:

> "The letter was not a contract between Appellant and Appellee. The *contract was verbal* and entirely executory."

At page 455 the Court said:

> *"It would have worked a rank injustice to have excluded* explanatory testimony showing what those conditions were, and that they were not complied with. (That the road was not built, etc.)" (Citing cases.)

The Court at page 456 said:

> "The rule is that *writings that only* acknowledge the existence of a simple fact *are susceptible of explanation and liable to contradiction."*

In *Scholbe* v. *Schuchardt,* 292 Ill. 529, the Court at page 534 said:

> "It would, indeed, be a hard and *unjust rule of law to be applied to the facts in this case if he were to be held beyond the actual terms of his verbal contract.*
>
> * * * * *

"It is *also the rule that where a contract is uncertain, ambiguous or incomplete the whole agreement may be proven.* (*Stone* v. *Mulvaine,* 217 Ill. 40; *Bradshaw* v. *Combs,* 102 id. 428.)

* * * * *

"* * * By the introduction of such evidence the written contract was not varied but was *simply explained* and set forth in full, so *that its exact meaning might be understood.*"

In *Chicago Daily News Co.* v. *Kohler,* 360 Ill. 351, an action at law, the Court at page 363 said:

"Again, where the terms of an agreement are in any respect ambiguous, and the parties have by their own acts placed a reasonable construction upon them, their interpretation will be adopted by the court. (*Burgess* v. *Badger,* 124 Ill. 288; *People* v. *Murphy,* 119 id. 159.) In *Slack* v. *Knox,* 213 Ill. 190, we said: "It is permissible in construing a contract to *look to the interpretation that the parties* thereto *have placed thereon* in its performance, for assistance in ascertaining its true meaning. *'No extrinsic aid can be more valuable'.*"

U. S. Supreme Court Has Established Equitable Principles.

The United States Supreme Court has frequently given expression to the maxim of equity that it regards substance rather than form. *Craig* v. *Leslie,* 3 Wheat. (U. S.) 563, 578; *Camp* v. *Boyd,* 229 U. S. 530, 559; *Hurley* v. *Atchison, etc. R. Co.,* 213 U. S. 126. In construing a written instrument this court has followed the principle that equity will look into all the circumstances under which the instrument was made so as to *ascertain the intention* of the parties and to *uphold and enforce the rights and duties that spring from that intention. Brick* v. *Brick,* 98 U. S. 514; *Peugh* v. *Davis,* 96 U. S. 332; *Texas* v. *White,* 10 Wall. (U. S.) 68; *Chesapeake, etc. Canal Co.* v. *Hill,* 15 Wall.

(U. S.) 94; *Mauran* v. *Bullus*, 16 Pet. (U. S.) 528. Greater regard is to be had to the *clear intention* of the parties than to any particular words which they may have used in the expression of their intention. *Chesapeake, etc. Canal Co.* v. *Hill, supra.* That *regardless* of what was written, the court must receive evidence of the *entire transaction and its true intent*, and that it is *reversible error to reject* such evidence, *Bank of British N. A.* v. *Cooper*, 137 U. S. 473.

In *Bank of British N. A.* v. *Cooper*, 137 U. S. 473 (1890) Justice Brewer of the U. S. Supreme Court at pages 476-477 said:

> "After the testimony was closed, counsel for the defendant moved to strike from the case all parol evidence tending to affect the *legal construction of the bill of lading* heretofore quoted. * * * The contention now is, that the bill stated the contract with all its terms, and being in writing, could not be varied or controlled by parol testimony. But this contention begs the question. The mere receipt of a bill of lading, of goods, is not necessarily an assent to the proposition that such bill of lading *states the contract* and the *whole* contract between the parties. Such bills may or may not be the contract. They may be nothing more, and *intended* to be nothing more, than *memoranda* or receipts. *Whether they are the entire contract, or simply in the nature of receipts, is not a question of law for the court, but one of fact for the jury.*" (Italics supplied.)

In Williston on Contracts, Sec. 618 it is said:

Primary rules of "interpretation".

> "4. The circumstances under which a writing was made *may always* be shown. The question the court is seeking to answer is the meaning of the writing at the time and place when the contract was made; and *all the surrounding* circumstances at that time necessarily *throw light upon the meaning* of the contract," cited Restatement of Law, Sec. 235 (d) 236.

In *Missouri Pac. R. Co.* v. *Texas & Pacific Ry. Co.*, 282 Fed. 61 (C. A. A. 5th), $23,000,000 of bonds specified that "interest be paid out of the net income of the railway company." The coupons required payment on *specified* interest dates. The Court, at page 63, says:

> "The conflicting contentions (one, for annual payments as called for by the bonds and coupons, and the other, that the board's discretion should prevail), call for a consideration of circumstances attending the issue of the income bonds, of provisions contained in the bonds, in the coupons, and in the mortgage, *and of conduct of parties to the transaction at and near the time when the instrument mentioned became effective, indicative of what those parties understood to be the meaning and effect of the instruments.*"

The Court at Page 70 said: • • •

> *"In determining the meaning of the provisions as to interest,* • • • it is proper to consider, not only the language of those provisions, but the *situation dealt with by the transaction of which the instruments containing those provisions were parts, and the objects or purposes sought to be accomplished by the parties to that transaction.*"

P. 71.

> *"During the many years of such silence and inaction of income bond-holders* • • • *knowledge of that fact and of the fact* that the surplus was being used to pay for maintenance, improvements, new equipment, etc., *was readily accessible, by the company's formal and public reports.*
>
> "It may be *inferred* that many of the income bondholders *were aware of those facts,* • • •
>
> "The provisions in question are considered not to be such as to justify the court in giving them a *meaning other than the one which* the *conduct of the parties to the transaction in which they were used shows that those parties understood and intended them* to have when the transaction was entered into and put into effect. The case is one of the adoption of the court of the interpretation given to a contract by the parties

thereto. *Hunting Elevator Co.* v. *Bosworth*, 179 U. S. 415, 435, 21 Sup. Ct. 183, 45 L. Ed. 256; *Thronateeska Pecan Co.* v. *Matthews*, (C. A. A.) 277 Fed. 361."

In *Day* v. *Ogdenburg Railway Co.*, 107 N. Y. 129, 142, the court held that the whole contract arrangement, whether oral or written, or both, and the consideration therefor will prevail over any conflicting language. It further *held that any construction which would destroy the intent of the parties would not be countenanced by the court.*

II.

(a) It Is the Established Law in Illinois That a Court Cannot Impeach a Prior Decree of Another Court. It Must Respect and Give Full Effect, and Sustain It, According to the Intention of the Court That Made It and the Parties Intended to Be Bound by It.

(b) If the Decree Was Doubtful, Evidence, Written or Oral, Must Be Admitted to Explain Its Intent, Purpose, Meaning and Understanding.

Consent decrees are subject to the same rules of construction by a court in equity as apply to other documents.

If the lower court had any doubt as to the effect of Judge Wilkerson's findings, decree and the reservation it should have received and given effect to all the evidence, oral and written, concerning the entire agreement, the intent, purpose and understanding of the parties, all the circumstances surrounding the transaction, the situation of the parties, the nature of the subject matter, the result sought to be accomplished and their own interpretation and performances under it so as to arrive at the true intent of the parties to the transaction.

This evidence would have enabled the later court (Judge Briggle) to resolve all doubts, and in this case, construe

the reservation in the finding of facts and decree of Judge Wilkerson, according to the intent of parties. *This purpose and intent,* (it is admitted by respondents) *was not to release the directors.*

In equity and in law, the decree is subject to the same rules of construction and interpretation in any case of doubt as are any other writings. There are no different rules of construction, except *in favor of giving the decree* of a court the fullest effect and scope it purports to have and the respect and sanctity it deserves as a judicial pronouncement binding on thousands of people all over the United States in so important a matter.

Judge Briggle had no power or authority and *could not impeach* or disregard the decree and findings, nor fail to give them full scope, effect and intent, nor could he substitute his own opinion for what the decree and findings plainly say.

In *Harvey* v. *Drew*, 82 Ill. 606, the Court held that parol evidence was admissible to show for what the judgment was recovered, not to contradict the record, but to show the real cause of action involved in the litigation. At page 609 the Court said:

> "* * * It has *never been doubted that parol testimony was* admissible to show for what the judgment was recovered, *not, of course to contradict or vary the record,* but to show the *real cause of action* involved in the litigation. * * *"

In *People* v. *Becker*, 253 Ill. 131, involving a prior judgment in a case of alleged tort feasors, and that the satisfaction and payment of that judgment operated as a release to an allegedly joint wrongdoer, the same question arose. The Court held that oral evidence is proper to explain what was included or *intended to be included* in the former adjudication. (Citing *Palmer* v. *Sanger*, 143 Ill. 34; *C. B. & Q. Rd.* v. *Schaffer*, 124 Ill. 112; Greenleaf on evi-

dence.) (Please note: We have also cited the case of *People* v. *Becker* later in our brief under the subject of Joint Tort Feasors.)

In our case Insull Jr. and Stuart seek to escape by claiming that they were indeed joint tort feasors (R. 220) if at all, and that the banks, by paying the amount decreed and satisfying the decree, there resulted a discharge to Insull and Stuart. The Becker case stated that the established law of Illinois was to the contrary.

In *Palmer* v. *Sanger,* 143 Ill. 34, the Court held that parol evidence was necessary. At page 136 the Court said:

> "What disposition the Court (in the New York judgment) made of the other items is left in doubt, and parol evidence to remove that *uncertainty* does not contradict the record in the sense that makes such testimony inadmissible as against the record."

In *Aloe* v. *Lowe,* 298 Ill. 404, the court held it is well settled that a decree is to be construed with reference to the issues *it was intended to decide,* and if its language is broader than is required it will be limited by construction so that its effect shall be such, only, as is needed for the purposes of the case that has been made and the issues that have been decided. (*City of Vicksburg* v. *Henson,* 231 U. S. 259; *Graham* v. *Chamberlain,* 3 Wall. 704; *Doscher* v. *Blackiston,* 7 Ore. 403; *Clay* v. *Hildebrand,* 34 Kan. 701.)

In *C. B. & Q. R. R.* v. *Schaffer,* 124 Ill. 112, the court, at page 121, said:

> "Where a former recovery (judgment) is relied on as a bar, parol evidence, *not contradictory of the record,* may, in case of such doubt, be introduced to show what was included within and investigated on the trial of the issue. * * * (*Vanlandingham* v. *Ryan,* 17 Ill. 25; *Barger* v. *Hobbs,* 67 id. 592. Greenleaf on Evidence, vol. 1, sec. 532 (14th ed.), says:
>
> 'When a former judgment is shown by way of bar, whether by pleading *or by evidence,* it is competent for the plaintiff to reply, that it did not relate to the

same property or transaction on controversy in the action to which it is set up in bar, and the question of identity thus raised *is to be determined by the jury upon the evidence adduced'.*"

The Illinois rule expressly holds that an agreement under which a judgment is taken controls.

In *Talcott* v. *Grant Wire and Spring Co.*, 131 Ill. 248, the court held that *parol evidence is competent to show the agreement under which a party takes a judgment*, as, that it was procured and allowed to be taken immediately, *to be used as a step* on a creditor's bill whereby to reach assets, not only for the plaintiff in the judgment, but for all other creditors of the same debtor. The effect of such evidence is *not to impeach the judgment.* * * * The Court said, at page 254:

"The evidence offered, and excluded by the court, was proper and competent evidence. It was *not offered to impeach* the judgment in any manner, but to show the purpose for which they were to be used as constituting a step in further proceedings. * * *"

In 34 Corpus Juris at page 506, Sec. 803, it is said:

"*Extrinsic Evidence.* Evidence outside the record, even parol, is admissible to show for what the judgment was recovered, that is, what was the real cause of action. *A judgment may be construed in the light of the circumstances* under which *it was rendered.*" * * * Citing: *Russell* v. *Place*, 94 U. S. 606, 24 L. ed. 214; *People* v. *Becker*, 253 Ill. 131, 97 N. E. 269; *Harvey* v. *Drew*, 82 Ill. 606; *Gould* v. *Svendsgaard*, 141 Minn. 437, 170 N. W. 595; *Matter of Pine's Stream*, 129 App. Div. 929, 114 N. Y. S. 681; *Devine* v. *Kilcommons*, 67 Misc. 177, 122 N. Y. S. 260; *LaBrie* v. *McKim*, 56 Ex. Civ. A. 322, 120 S. W. 1083; *Gilbert* v. *Earl*, 47 Vt. 9.

In 34 Corpus Juris it is further said (506) (note 58):

"The same rules of interpretation apply in ascertaining the meaning of a *court order or judgment* as in

ascertaining the meaning of any other writing, and if the language be in any decree uncertain, we may properly refer to the circumstances surrounding the making of the order or judgment." Ex. p. Ambrose, 72 Cal. 398, 401, 14 P. 33, 35.

(c) In Illinois a Decree Does Not Terminate a Cause of Action Against Wrongdoers If the Intention Appears to the Contrary.

National Lock Co. v. *Hogland* (C. C. A. 7, 1938) 101 F. (2d) 576, arising in Illinois. There a *final decree* had been entered approving a reorganization plan under Section 77-B of the Bankruptcy Act, a previous interlocutory order contained a provision whereby the right of the corporation to prosecute certain suits against its officers and directors for misappropriation was *reserved to the corporation.*

In the suit subsequently brought against the officers and directors, they *contended* for dismissal on the ground that the reorganization *decree terminated the court's supervision of the corporation* and that it lost jurisdiction when it entered the final decree, and therefore the reservation was of no force.

However, the Circuit Court of Appeals (7th Circuit) affirmed judgment against the defendants and held that the *reservation was a contract by the corporation, the court and the intervening stockholders* which was to *"subsist notwithstanding the entry of the final decree"* and "cannot be repudiated with the sanction of a court of equity." In referring to the reservation in the plan which was approved, the court said, page 585:

> "they represent that certain facts existed and that certain acts will be done which constitute an *inducement for the acceptance of the proposed plan."* (Italics added.)

(How like the case at bar?)

The same Circuit Court of Appeals said:

"We must assume that the district judge in making his final decree in which he *excepted from the restraining order* the 'said order of February 26, 1935,' recognized and intended to give effect to the representation of paragraph 6 of the modified petition and plan of reorganization which recited that the 'final decree of this court shall in nowise *estop or prejudice* the Debtor from bringing and prosecuting the suit or suits against officers, directors and others authorized in the order of this court, dated February 26, 1935."

And at page 586, the Court said:

"*It was contemplated and understood by both the court and the interested parties that the purpose of the authorization of the suit in question was to restore assets to the corporation for the benefit of the corporation, stockholders and creditors.*"

"* * * The recital in the modified petition and the plan of reorganization that the entry of a final decree was not *to affect the authority* to proceed under the order of February 26, 1935, *indicates that the aforesaid understanding* and *intention were common to the* interested parties."

At page 587 the Court said:

"* * * But it does not result in double recovery or a violation of the doctrine of 'election'. It has been said by the United States Supreme Court in *Friederichsen* v. *Renard,* 247 U. S. 207, 38 S. Ct. 450, 62 L. Ed. 1075, that 'At best this doctrine of election of remedies is a harsh, and now *largely obsolete rule,* the *scope of which should not be extended.* * * *'"

(In the *National Lock Co.* case the attorney who *successfully* contended that the action *was not barred against the wrong doing directors* is the *same counsel* who now contends exactly the opposite in the case at bar.)

Bogert on Trusts says:

"* * * The wrongdoing defendant has no real ground for complaint against the use of several means of redress for the same wrong, if in fact they are needed. * * *"

In *May* v. *LeClair*, 11 Wall. 217, 236, this Court said:

> "The cardinal principal is that the wrongdoer *shall derive no benefit from his wrong.*"

In re The Mariska (C. C. A. 7, 1901), 107 Fed. 989, involved a proceeding in admiralty by a shipowner to obtain contribution from another shipowner for damages he was required *by decree*, the instant defendant not having been a party to the prior suit. At page 993 the Court said:

> "The *decree is of moment to establish the fact of compulsory payment* of damages by the Jay Gould. * * *"

The Court held that parol evidence was competent to show what the subject matter of the other decree was. (Citing *O'Shea* v. *Railroad Co.*, 105 Fed. 559 (C. C. A. 7th Cir.)

In *Jones Syndicate* v. *Commissioner of Internal Revenue*, C. C. A. 7th (1927), 23 F. 2d 833, the court held that parol evidence to explain the real character of the transaction involved in written instruments is admissible against third parties, even if the third party is the United States Government. The court, at page 834, said:

> "Such evidence is admissible against third parties. *In re Assessment of Shields Bros.*, 134 Ia. 559, 111 N. W. 963, *Signa Iron Co.* v. *Greene* (C. C. A. .....), 88 F. 207, *O'Shea* v. *N. Y. C. & St. L. R. Co.* (C. C. A. 7—1902), 105 F. 559, *Michell* v. *McShane* (C. C. A. .....), 220 F. 878, 22 Corpus Juris 1292."

Parol evidence is admissible as against a stranger to a decree of court, to explain and sustain the decree, if there is the least doubt.

The circuit court of appeals in our case overlooked the established law of Illinois on this subject and its own prior decisions.

(d) Respondents as Stockholders Are in No Position to Attack or Impeach the Decree of Judge Wilkerson.

The proceedings before Judge Wilkerson were part of the agreement and arrangement for settlement. The decree was by consent of the parties, to carry out *their Agreement and their intent, meaning and understanding.*

Defendants as stockholders of I. U. I. (R. 25) cannot collaterally attack the decree of the District Court. They are bound because the same decree was also entered in the Bankruptcy Proceedings of I. U. I. preserving the same rights of action against them. It was binding on I. U. I. and its Trustee in Bankruptcy. Defendants, being stockholders and officers of the corporation (complaint, R. 3, *et seq.*) were thereby represented, and are bound by that decree in the same manner as if they were parties to the proceeding. (*Singer* v. *Hutchinson,* 183 Ill. 606, 613; *O'Connor* v. *Board of Trustees,* 247 Ill. 54, 59.)

In *Sanger* v. *Upton,* 91 U. S. 56, arising in the Northern District of Illinois, this Honorable Court, in a somewhat similar situation, at page 59 said:

> "In the view of the law, she was before the court in all the proceedings touching the body of which she was a member. * * * If they choose to rest supine until cases against them like this are on trial, they must take the consequences. Not having spoken before, they cannot be permitted to speak then, * * *."

The decision in Sanger *vs.* Upton was followed by this Court in *Grant* v. *Leach,* 280 U. S. 350, 360.

Judge Briggle had no authority in 1940 to disturb such decree to impeach its effect or to construe it contrary to the intent, purpose, meaning and understanding of the court (Judge Wilkerson) who entered it, or of the intent, purpose, meaning or understanding of all the parties to that proceeding who requested the court to make the de-

cree. Judge Wilkerson found it fair, just and equitable to the parties to be bound thereby.

Even if the respondent's claim not to have been bound by the decree, it is the established law that a stranger to the proceeding cannot collaterally attach a decree which does not order him to do anything or take away any property right which he had at the time such decree was entered. (34 C. J. 526 and cases cited. *Ellison* v. *Drake*, 145 Ill. 500.) The respondents are estopped from complaining of the decree. *Oliver* v. *Ross*, 289 Ill. 624, 640 (Floyd E. Thompson, Judge). Such silence has a fraudulent effect on the debenture holders. *Milligan* v. *Miller*, 253 Ill. 511. In either event, the Circuit Court of Appeals did not correctly apply the established law of Illinois in this respect.

III.

DISTRICT COURT PROCEEDED ERRONEOUSLY AND IMPROVIDENTLY UNDER RULE 56 ESPECIALLY SINCE HE FOUND THE INTENTION TO BE DIFFERENT THAN THAT SHOWN BY THE UNCONTROVERTED EVIDENCE.

Plaintiffs Were Entitled to a Trial by Jury and Due Process of Law.

In 1939, two years after the bank settlement proceeding, the respondent directors made a motion for summary judgment before Judge Wilkerson, but he transferred the cause. In 1940 it came up before Judge Briggle (R. 286-287).

The District Court acted erroneously and improvidently in granting judgment in this case summarily under Rule 56 of the Rules of Federal Procedure, the face of the objections of the plaintiffs (see plaintiffs' counter motions to strike and Answer on Facts, R. 224-268) and in rejecting uncontroverted evidence of the agreement, and of the intention of the parties.

Without granting a trial by jury, as demanded (R. 265-277) he found that the intention of the parties was different than that shown in the record.

Judge Briggle distorted the agreement and the petition. He said:

> "There is not a single expression that even hints that plaintiffs were *only* contracting with the banks. (R. 293. Italics supplied.)" (This is exactly contrary to the facts as heretofore shown),

and proceeded to inject an intention that was not a fact. He said:

> "By throwing in Paragraph K, it is hoped to have the settlement construed as something it was not." (R. 293.)

In finding that the intention of the parties was different than that shown by the uncontroverted facts, Judge Briggle proceeded contrary to Rule 56, which authorizes summary judgment proceedings only where the record shows that "there is no genuine issue as to any material fact".

If the court found any doubt in some decree, some proceeding or some agreement of other persons, he was in duty bound to hear the facts which would have cleared up any such doubt. We believe it was an abuse of discretion to dispose of the controversies in this case summarily under that Rule.

We believe such procedure does not afford the litigants due process of law.

If Judge Briggle found any controversy or doubt about the intention of the parties, or the former decree, findings or proceedings, he had no right to decide the issue under Rule 56. He should have called a jury to hear the evidence (or at least heard the evidence himself).

This evidence concerning the intent would have prevented the emasculation, distortion and misconstruction of the decree of Judge Wilkerson and of the reservation of

all rights of action against the directors, which reservation appears to have been meaningful and vital to the thousands of people who relied on it, and to make the settlement fair, just and equitable as found by the Court which approved it (R. 170). *The reservation was so found by Judge Wilkerson as a fact, and was one of the conditions upon which the settlement was contingent* (R. 166, 167).

IV.

DIRECTORS AND THE BANKS WERE NOT JOINT TORT-FEASORS. DIRECTORS WERE TRUSTEES.

(Reply to Defendants' Point III, Pages 30, 34.)

Respondents now contend that they were only joint tort-feasors if at all, with the banks, and only liable for the same wrongs as had been charged against the settling banks; that now they, the respondents, are entitled to escape, because they are such joint tort-feasors with the banks.

They said under oath in an affidavit attached to their motion (R. 220):

> "Whatever wrong was committed, if any, was committed *jointly* by the banks and these defendants as directors." (Affidavit of Samuel Insull, Jr., H. L. Stuart.)

The respondents contend this to be so as a matter of law, regardless of the nature of their own connection with the debenture holders and with I. U. I. and regardless of the amount recovered by the debenture holders for wrong doings.

The individual suits against the banks was for refusal to share collateral with the debenture holders and sought a lien or interest in such collateral. This the Court decreed against. (*Kelly* v. *Banks*, 11 Fed. Supp. 497; Remanded

for Findings, 85 Fed. (2d) 61.) The directors, respondents, were not parties,—no relief was asked against them.

Each bank was a defendant in a separate transaction and in a separate suit, and all the banks were also defendants in a joint suit. Each had made a separate loan at different times and under different circumstances. Some early loans were made from some of them, not in violation of the 50% restrictive clause in the debenture, and some afterwards, some with knowledge of the restrictions and some without such knowledge. They had demanded security and obtained collateral. They insisted that they had a right to such collateral and that they followed the established law of "The Law Merchant."

Each bank asserted that it had no notice of the debenture restrictions and that they assumed no duties to any debenture holder.

The New York Court dismissed the joint suit charging the banks with acting jointly. The decree was final. No appeal was taken. (*Kelly* v. *Banks,* 11 Fed. Sup. 497.)

The directors, however, *induced, caused, resolved, ordered* and *made these loans.* They *knew the debenture covenants.* They had *assumed responsibilities as trustees* of a *special investment trust,* to the investors *whom they induced to trust them,* their advertised reputation and *integrity as managers, operators and financiers* of the Insull Utilities, and who would *carefully select, control and safeguard the securities* which were protection for the debentures.

The suit against the directors is for accounting for the violations of their trust which they assumed to the debenture holders by their representations and solicitations made by millions of circulars, papers, letters and public announcements. (Please refer to our Statement of Facts, *supra.*)

Under the law of Illinois such directors *became trustees*

for the debenture holder creditors who were invited and *induced* to rely thereon.

Delano v. *Case*, 121 Ill. 247.
Chicago Title & Trust Company v. *Munday*, 297 Ill. 555, 562.
Albers v. *Sullivan*, 287 Ill. App. 461, 465-7.

The decision of the Circuit Court of Appeals that the directors were not trustees is in conflict with the above decisions and is also in conflict with the decisions of this Court, other Circuit Courts of Appeal, and other state Courts:

Jackson v. *Ludeling*, 88 U. S. 616.
Boyd v. *Schneider*, 131 Fed. 223 (C. C. A. 7).
Strauss v. *United States Fidelity & Guaranty Co.*, 63 Fed. (2) 174, 179 (C. C. A. 4).
Davis v. *Virginia Ry. & Power Co.*, 229 Fed. 633 (C. C. A. 4).
Whiteford v. *Moehlenpah*, 196 Wis. 10.
Lynch v. *Conger*, 168 N. Y. Supp. 855, 858, affirmed 229 N. Y. 543.
Belden v. *Burke*, 25 N. Y. Supp. 601.
Wells v. *Carlsen*, 130 Neb. 773, 226 N. W. 618.

It takes only the simplest common sense to know that in a gigantic financial catastrophe of this kind, it is afterwards, usually discovered that in thousands of different improper or illegal ways, and at different times, and under different conditions, some have improperly used or wasted cash, some have rigged the market and some have squandered or pledged assets in different amounts, in different ways or at different times, or had induced or made breach of different covenants in different obligations, under different circumstances, and different times, to different people, or had committed the different wrongful acts in the circumstances which the complaint charges, at different times,—(or that some one director might have been absent from one meeting or had no knowledge or connection of one

particular pledge transaction, or one particular wrongdoing),—that all can be only *jointly* liable for *every* and *any* such different obligation or different wrongful transaction?

It is preposterous to say that creditors of a bankrupt can never recover any and everything from each separate individual who is obligated to them in any and every way, or who owes money to the bankrupt corporation (whether the action or liability is in trespass, damages, debt, assumpsit, contract, equity, foreclosure, accounting, specific performance, detinue, etc., etc.),—that they cannot procure from any one or more of them whom they can find, the payment of an obligation or return of property questionably taken, or demand an accounting from each and every person who should account, or accept some money settlement from any one or more of the great many persons or corporations who may be claimed to be responsible, or who did some legally improper act or thing, until they get complete satisfaction at one time from all.

It is ridiculous to contend that all creditors must sue everyone in any way liable to them or to the corporation in one case; that they must wait (forever) to get service of process on all people who avoid the jurisdiction or cannot be found and to pursue all litigations against all of them whose liabilities, obligations, duties and commitments are different, *to the bitter and expensive end,* and do nothing at any time to recover partially from one or more of them for their losses, without losing their right to recover the balance from the others.

Could all such people escape for the balance of the $57,000,000 lost just because some alleged wrongdoers in good faith make partial restitution or settlement? Can all the other parties who brought about the huge losses at different times under different circumstances and under different obligations and liabilities and in different ways,

—escape? Such doctrine is just *nonsense*. It violates every principle of right and justice and equity, and the due administration thereof.

In a decision *In re Insull Utility Investments, Inc., bankrupt*, 6 F. Supp. 653, Judge Evans (senior judge of the Circuit Court of Appeals for the 7th Circuit, and then sitting in the District Court), said, at page 658:

> "A brief review of the situation that existed when the receiver was appointed is herewith attempted. It is quite impossible to separate the application for the appointment of a receiver in Insull Utility Investments, Inc., from like applications in Middle West and Corporation Securities Companies.
>
> "Three companies were organized and promoted by the so-called Insull interests. They all revolved about the activities of one Samuel Insull, Sr. One company, the Middle West, was a holding company, and the other two are investments trusts.
>
> "Neither the genus, the holding company, nor the specie, the investment trust, can find but little justification for legal existence. * * *
>
> "As it was conducted in 1929, the investment trust was nothing but a glorified gambling institution. * * *
>
> "In 1929 (referring to Eaton, etc.), piracy was not outlawed, nor, it seems, was there any closed season on the operations of those engaged in this popular pastime on the sea of high finance. When the smoke of this conflict disappeared and the damage was appraised, it was found that the assets of the Insull Utility Investments, Inc., were sadly depleted.
>
> "In the succeeding months the company borrowed vast and ever vaster sums of money from banks, to secure which it hypothecated most of its remaining assets. * * *" (Interpolation supplied.)

We do not believe that all or any of the respondents were tort feasors in the sense used under the same archaic common law rules which defendants now seek shelter under. They are asked to account for wrongdoings as Trustees and for inducing, making, ordering and directing wrongful pledges. We do not believe, and the New York

Court finally held that the banks acting together were not tort feasors. We do not believe that the respondents were joint tort feasors with the banks or all or any of them, and that in justice and equity no wrongdoer should escape, even if a joint wrongdoer. (*May* v. *LeClair,* 11 Wall. 217, 236, *supra; Veazie* v. *Williams,* 8 How. (U. S.) 134; *Lovejoy* v. *Murray,* 3 Wall. 1, U. S. Supreme, *infra.*)

The Courts of Illinois Have Studiously Distinguished All Situations to Avoid Releasing Other Wrongdoers: the Overwhelming Weight of Outside Authority Is the Same.

To get *away* from the harsh ancient common law rule of "release" (which is indefensible and only helps wrongdoers) in Illinois the Courts have made every effort to prevent the escape of any wrongdoers who seek to escape by *insisting* that they *are* joint wrongdoers and therefore entitled to escape. The Courts of Illinois and of every other enlightened jurisdiction have seized upon the lightest difference in the situation of parties who contribute to or participate in the same transaction which causes losses and have sustained recovery for uncompensated damages in every case (a) where the slightest intention was shown not to release (b) have held proper every instrument which showed such intent, (c) have called such instruments *not* "releases" but covenants not to sue—or (d) to have the effect of such covenants, and in every such instance the courts have held that the other party to such tort is not released.

The decision of the Court of Appeals that the directors and the banks were joint tort feasors is in conflict with the decision in the bank litigation (*Kelly* v. *Central Hanover Bank & Trust Co.,* 11 Fed. Supp. 497 (85 Fed. (2d) 61), and is in conflict with the following decisions:

People v. *Becker,* 253 Ill. 131.

Barnes v. *Barnett,* 188 Ill. App. 32.

Scharfenstein v. *Forest City Knitting Co.*, 253 Ill. App. 190, 202 (certiorari denied by Illinois Supreme Court, 254 Ill. App. xviii).

Dougherty v. *California Kettleman Oil Royalties*, 13 Calif. (2) 174, 88 P. (2d) 690 (1939).

Flannery v. *Flannery Bolt Co.*, 108 Fed. (2d) 531, (C. C. A. 3, 1940) cert. denied, 60 S. Ct. 615.

Arkansas National Bank v. *Martin*, 110 Ark. 578, 163 S. W. 795 (1914).

Veazie v. *Williams*, 8 How. (U. S.) 134.

Dougherty v. *Calif. Kettleman Oil R. Inc.*, 13 Calif. (2) 174.

Young v. *Anderson*, 33 Idaho 522.

Pittsburgh Rys. Co. v. *Chapman*, 145 Fed. 886 (C. C. A. 3).

Defendants' attempt to distinguish the case of *People* v. *Becker*, 253 Ill. 131, cited by us, in our Brief in Support, on the ground that the two constitutional officers involved had "separate and distinct obligations *to the public.*" That is also the fact in the case at bar. The directors and the banks had separate and distinct obligations to the debenture holders. The banks had an obligation only to account to the debenture holders for their share of the securities as required by the covenant, provided the Law Merchant was not sustained,—which it was.

The directors had an obligation to see to it that (a) *payment was provided* for the payment of such debentures (R. 14, par. 1), otherwise, (b) that the securities of the company were not to be pledged without providing equal and ratable security for the debentures; they had also (c) induced the investors to rely on their standing, reputation and control for the safety of the debentures, and assumed the obligation to refrain from doing anything with the company or its assets which might injure the debenture holders. They had so solemnly assured, promised, represented and covenanted.

V.

THIS COURT HAS HELD THAT THE LIABILITY OF THE JOINT WRONGDOER REMAINS IN MORALS AND ON PRINCIPLE AND DOES NOT RELEASE HIM ON ANY EQUITABLE CONSIDERATION. WRONGDOER SHALL DERIVE NO BENEFIT FROM HIS WRONG.

In *Lovejoy* v. *Murray*, 3 Wall. (U. S.) 1, the United States Supreme Court rejected the closely analogous doctrine that a judgment against one joint trespasser is a bar to a suit against another for the same trespass and held that nothing short of full satisfaction, or its equivalent can make such judgment a bar. At page 16, Mr. Justice Miller said:

> "*The whole theory of the opposite view is based upon technical, artificial, and unsatisfactory reasoning.* * * *
>
> "But in all such cases, what has the defendant in such second suit done to discharge himself from the obligation which the law imposes upon him, to make compensation? *His liability must remain, in morals and on principle,* until he does this. The judgment against his co-trespasser does not affect him so as to release him on *any equitable consideration.*
>
> "But it is not easy to see how he is so affected, until plaintiff has received full satisfaction, or that which the law must consider as such.

The Supreme Court rejects the theory asserted by the respondents in this case as was asserted by the defendants in the Lovejoy case, and holds that even though title to property was transferred to one of the trespassers who settled it was absurd to contend that this amounted to a

satisfaction, and the court in discussing that point says, at page 17:

> "In other words, the law, without having given me satisfaction for my wrong, takes from me that which was mine, and gives it to the wrong-doer. *It is sufficient to state the proposition to show its injustice.*"

We do not admit that debenture holders transferred any title. They had none. The Answer on the Facts (R. 230-268) refutes any such assertion. The same Court decided the case of *May* v. *LeClair*, 11 Wall. 217, *supra*, in which this Court said (page 236):

> "The *cardinal* principle is that the wrongdoer shall derive no benefit from his wrong." (Escape from accounting. Interpolation is ours.)

Defendants attempt to distinguish *Veazie* v. *Williams*, 49 U. S. 134, cited by us. This Honorable Court held to the same effect as in the Lovejoy case. In the Veazie case the instrument was *in form an actual formal release* and not a covenant not to sue as defendants imply. *In fact it did not even contain any reservation*, but the court considered the *surrounding circumstances and determined the intention of* the parties to be that it released only (one of the wrong-doers in the *same* one transaction) the releasee. The language of the Supreme Court was not "dictum" as defendants say, but was the ruling of the court on the specific question before it.

(In our Brief in Support to the Petition for Certiorari we discuss some of the other Illinois authorities on "Joint" Tort (?), and we also discuss other Illinois authorities under "Intent," "Release" and "Covenants," later in this brief.)

VI.

DEFENDANTS ARE NOT ENTITLED TO UNDESERVED WINDFALL IN THIS CASE.

This expression has found its way in many courts and in many different statements. It is summarized in 34 Cyc. p. 1083, which says:

> "As this *technical* rule (release of one and all) often *defeats* the avowed intent of the releasor and *frequently gives an undeserved windfall.* * * * the courts show a very decided tendency to defeat its operation by construing such instruments as covenants not to sue. * * *" (Citing cases.)

In the "Comment" in the Restatement of Torts (1939,) under Sec. 885, it is stated:

> "It frequently resulted in the unintended and unpaid for discharge of one of the tort-feasors. The rule is not consistent with the modern American point of view."

VII.

NO RELEASE UNDER LAW OF ILLINOIS.

In Illinois the intent of the parties to a settlement contract must prevail. This is true in tort as well as in contract cases. It is reversible error to reject evidence of such intent.

Contracts in the nature of releases or covenants not to sue are no exception.

Any other rule would be harsh and unconscionable and would lead to the gravest injustice.

In Illinois the general rule of release governing unqualified releases does not apply where the release contains a reservation of the right to sue others jointly liable.

This point is crucial.

Respondents cite not one authority in Illinois holding to the contrary.

In **every case** presented to the Illinois courts, whether in **contract or tort,** and **whether** the instrument was in form a **release or covenant** not to sue or other transaction which it was claimed operated to discharge others jointly liable, the Illinois courts have consistently held that unless the injured party has received full compensation for his damages:

(a) **effect must be given to the intention of the parties;**

(b) That if it appears that **the intention was not** to release others, the instrument or transaction **is treated as if it were a covenant not to sue without releasing any others;**

(c) That an **express reservation** of a cause of action against a joint debtor or joint tort feasor in a release **will be given effect regardless of the use of words of "release"** in the same document;

(d) That the **Court will construe** a settlement arrangement to **amount only to the effect of a covenant not to sue,** if it was not intended to release other wrongdoers;

(e) That a release is not superior to any other agreement, but on the contrary may always be **contradicted or explained.**

(There are no cases to the contrary in Illinois. There is no distinction between "tort" or "contract" releases or covenants.)

Parmelee v. *Lawrence,* 44 Ill. 405 (1867).
Severin v. *Eddy,* 52 Ill. 189 (1869).
Emory v. *Addis,* 71 Ill. 273 (1874).
Miller v. *Dobschultz,* 89 Ill. 176 (1878).
Callaghan v. *Myers,* 89 Ill. 566 (1878).
Moore v. *Stanwood,* 98 Ill. 605 (1881).
Thomason v. *Clark,* 31 Ill. App. 404 (1889).
Wagner v. *Union Stockyards,* 41 Ill. App. 408 (1891).

City of Chicago v. *Babcock*, 143 Ill. 358 (1892).
Dupee v. *Blake*, 148 Ill. 453 (1893).
West Chicago R. R. v. *Piper*, 165 Ill. 325 (1897).
Chicago, etc. R. R. v. *Hines*, 82 Ill. App. 488 (1898).
Clark v. *Mallory*, 185 Ill. 227 (1900).
City of Chicago v. *Smith*, 95 Ill. App. 335 (1900).
Brennan v. *Electric Inst. Co.*, 120 Ill. App. 461 (1905).
Skinner v. *Sullivan*, 127 Ill. App. 657 (1906).
Chicago & Alton v. *Averill*, 224 Ill. 516 (1906).
Wallner v. *Chicago Traction Co.*, 245 Ill. 148 (1910).
Gore v. *Henrotin*, 165 Ill. App. 222 (1911).
Nickerson v. *Supplee*, 174 Ill. App. 136 (1912).
Miller v. *Lloyd*, 181 Ill. App. 230 (191.....).
Balsley v. *Hetzel*, 182 Ill. App. 136 (1913).
Barnes v. *Barnett*, 188 Ill. App. 32 (1914).
Baxter v. *Rothschild*, 204 Ill. App. 346 (1917).
Purinton v. *Belt Ry. Co.*, 204 Ill. App. 382 (1917).
Nixon v. *City of Chicago*, 212 Ill. App. 365 (1918).
Wallace v. *Armstrong*, 236 Ill. App. 457 (1925).
Van Meter v. *Gurney*, 251 Ill. App. 184 (1929).
Scharfenstein v. *Forest City*, 253 Ill. App. 190 (1929).
Forster v. *Sheridan Bank*, 257 Ill. App. 463 (1930).
Reams v. *Janoski*, 268 Ill. App. 8 (1932).
Onyschuk v. *Vincent*, 277 Ill. App. 414 (1934).
Puck v. *City of Chicago*, 281 Ill. App. 6 (1935).

We do not admit that either any of the directors or either one of the banks were *tort* feasors, or that they were not accountable or liable in any other legal or equitable manner. But we do say, that even if they all could be considered as *joint tort* feasors, nevertheless they cannot escape responsibility in this case.

Under the Illinois law, if a release, as in the case at bar, *contains language manifesting* an intention not to discharge others jointly liable, effect must be given to that intention and this is done by treating the release as if it were a covenant not to sue, leaving the liability of the others unaffected. (*Parmelee* v. *Lawrence*, 43 Ill. 145.)

At page 410 the Court in the Parmelee case said:

> "But a release, like every other written instrument, *must be so construed as to carry out the intention of the parties.* The intention is to be sought in the language of the instrument itself when read in the *light of the circumstances which surrounded* the transaction. The court which interprets must place itself as nearly as possible in the position of the parties when they acted."

(This case was followed and approved in *City of Chicago* v. *Babcock*, 143 Ill. 358,—a tort case.)

In *City* v. *Babcock*, 143 Ill. 358, the facts were: Emma Babcock recovered a judgment for $1,500, against the city, which it sought to reverse. She had *brought two suits* to recover judgments for the injuries she sustained (p. 363)—one the suit at bar against the City, the other a suit against Lecardi, owner of the building, on the public sidewalk of which, she claimed to have been hurt.

The Court says:

> "Afterwards Lecardi paid to the attorneys of appellee Babcock the sum of $150, the larger portion of which was applied by the attorneys in paying the costs of the suit and a sum $30 or $40 given to appellee. * * *
>
> "She signed a paper '*it is hereby agreed* that no *action shall be begun against Lecardi* by reason of any matters existing at this time by the undersigned. Given for good consideration.' Signed Emma Babcock, by Pease & Williams, Attorneys." * * *
>
> **(In effect this is analogous to what the decree made by Judge Wilkerson enjoined in the case at bar.)**

It further appears that afterwards the suit was dismissed out of court at plaintiff's costs.

The court *admitted evidence of the settlement with Lecardi* (p. 365) offered by either party *that had any bearing upon the question* of the nature of the transaction and arrangements between appellee and either Lecardi or the plaintiff.

(In the case at bar, the judge refused such evidence.)

The Court in the Babcock case submitted all such evidence to the jury.

The jury found a verdict against the City for $1,500. (Evidently the jury was satisfied that the $150 obtained from the joint tort feasor was not full compensation. Interpolations are ours.)

The Court held (page 366):

"*Here there is no claim of a technical release under seal.*"

(There is no claim in the case at bar that any debenture holder executed any kind of a release to anybody.) (Interpolations ours.)

"The pending suit against Lecardi was dismissed and a written agreement was signed that no action should be begun against Lecardi. This on its face was simply *an agreement or a covenant not to sue.* The legal effect of such a covenant *is not the same as* that of a *release.*

"A covenant not to sue a sole tort feasor is, to avoid circuity of action, considered in *law a discharge,* and a bar to an action against such tort feasor. But the *rule is otherwise where there are two or more tort feasors,* and *the covenant is with one of them* not to sue him.

"*In such case the covenant does not operate as a release of either the covenantee or the other tort feasors* * * *"

* * * * *

"In fact, it was for the interest of the latter (the City) that appellee should receive part payment of her claim from LeCardi, and thereby reduce the amount of damages recoverable from it.

"The views we have expressed are sustained by the

following authorities: *Snow* v. *Chandler,* 10 N. H. 92; *Knapp* v. *Roche,* 94 N. Y. 329; *Bloss* v. *Plymale,* 3 W. Va. 393; *Sloan* v. *Herrick,* 49 Vt. 327; *Brown* v. *Marsh,* 7 id. 320; *Chamberlain* v. *Murphy,* 41 id. 110; *Ellis* v. *Esson,* 50 Wis. 138; **Parmelee v. Lawrence,** 44 Ill. 405."

The Babcock case is relied on and cited by many other Courts in the United States as settling the established law of Illinois which refuses to recognize a "release" in *tort* cases, where any contrary intention appears.

In the case at bar, the debenture holders **signed no release of any kind, technical or untechnical, seal or no seal. They signed nothing.**

They were only restrained from suing the banks.

In the Babcock case, the court expressly approved the rule that *in a tort case that no release will be effected of a joint tort feasor if the intention is otherwise.* This is exactly the same rule as the Parmelee case laid down in connection with joint obligors.

Therefore, in Illinois, the rule that an instrument will be construed only as a covenant not to sue applies equally to tort cases as well as to contract cases.

In *Adams* v. *Beckwith,* 100 Ohio Stat. 348, cited *infra,* the Court cited with approval and held that the Babcock case showed what the established law was in Illinois in tort cases. It relied squarely on the Babcock case.

In citing cases outside of Illinois in support of its rule the Supreme Court of Illinois adopted the holding of the followig cases:

In *Sloan* v. *Herrick,* 49 Vermont 327, that Court said, at page 328:

> "In actions of tort, *nothing less than* what in law is regarded a legal *satisfaction* of the tort by one joint tort feasor *will operate to discharge the other tort feasor. Neither the recovery of a judgment* • • • nor the *release of one on the receipt of part satisfaction for the tort,* when *it is expressed in the release*

that the sum paid is received *only in part satisfaction,* operates to bar the injured party from pursuing the other joint tort feasors for so much of the tort as remains unsatisfied."

Bloss v. *Plymale,* 5 W. Va. 393 and *Ellis* v. *Esson,* 50 Wis. 138, are to the same effect as the *Sloan* case.

In *Ellis* v. *Esson,* 50 Wis. 138 approved in the *Babcock* case (*supra*), *many* defendants cut away timber from plaintiff's land. One paid $200 and plaintiff covenanted not to sue him.

The evidence showed that plaintiff did not receive the money in full compensation but that he *intended to look to other wrong doers* for the balance.

The Court held that the contract of settlement was *no defense to the other wrong doers* since this was not a technical release under seal.

At page 102 the Court said:

"In other words, when the contract (of settlement) is *not of such a nature* that the law deems it *conclusive* evidence that the injured person has been *satisfied for the wrong,* then it becomes a question *of fact for the jury* whether * * * it was full satisfaction, and if it appears that it was not so received (in full satisfaction) it is only *pro tanto* a bar to an action against the other wrong doers.

"*And this view of the case, we think is sustained by the great weight of authority.* * * *"

At page 104 the Court said:

"That joint wrong doers are always held liable to the injured party severally as well as jointly."

And also at page 105 the Court said:

"*Certainly* the receipt of a partial satisfaction from one of two joint feasors *is no injury to the other* * * * who is afterwards sued for the trespass. On the other hand it is to *his benefit* as he has the advantage of what was paid by his associate in the wrong by reducing the judgment against him."

The Court further held that there is no difficulty in deciding whether compensation was in full where property was involved as it was subject of easy proof and computation.

(In our case the debenture holders lost everything, $57,000,000. They recovered only 7½%. On the record it is admitted that the debenture holders still are losers to the extent of $53,000,000.)

* • • • •

(Please Note. In our Brief in Support to the Petition for Writ of Certiorari we have already discussed and quoted from the other Illinois cases which support this section.)

The Circuit Court of Appeals in Our Case Overlooked and Refused to Follow the Established Law of Illinois as Interpreted by Its Own Court.

In *O'Shea* v. *N. Y. C. & St. L. R. Co.*, 105 Fed. 559 (C. C. A. 7th, 1901), a tort case, the Court held that parol evidence was admissible to show that the *release* was not intended to be in full satisfaction.

The Court held that even though the *release be under seal,* and where it appears that money was not received as full satisfaction for the injury, contradictory language (*e. g.,* words of release), in the instrument will be *disregarded,* and *it will be treated as a covenant not to sue.* Also that when a third party challenges the effect of the paper, **then both parties to the paper and the third party may introduce evidence concerning the instruction.** The Court further reversed the case for a trial by jury as to what the settlement contract really was.

The Court at page ..... said:

"The first part of the document recites it is for a sum of $1200.00 agreed upon in *full settlement of all*

claims, demands or *causes of action*, whatever, etc. * * *

"in *full settlement* for any and all injuries resulting from the document * * *

"in *full payment* of the above account 'in consideration of the payment of said sum' *a covenant never to sue the* * * * company upon any claim, etc. whether arising upon contract or upon tort."

The Court held:

"This document is an accord and satisfaction *coupled* with a *covenant never to sue* * * *

There are upon the face of the paper *certain indicia of an intention of O'Shea not* to accept the sum stated in full settlement of all claims and *causes of action* against the Burlington Co. there follows this expression: '*but not the New York, Chicago & St. Louis Railroad.*' * * *

"The agreement contains a general release * * *

"The *oral testimony* at the trial clearly established that it was *not intended by either party to the paper* that the sum of $1200 should be paid to O'Shea in full satisfaction of his injuries, that it *was not intended* by either party that the document which O'Shea was to sign should be *anything more than a covenant not to sue* the Burlington Company. In other words, the paper does not express the actual agreement of the parties. The question then arises whether such oral testimony was admissible * * *

"The court further said, quoting Greenleaf, that the rule which prohibits parol evidence to written instruments 'is applied only to suits between the parties to the instrument' * * *

"*it cannot affect third persons.*

"See, also, Whart. Ev. 92. In a suit between a party and a stranger, *neither is concluded* by the contract, but *either may give evidence* differing from it. *Lee* v. *Adsit*, 37 N. Y. 78; *McMaster* v. *Insurance Co.*, 55 N. Y. 222; *Yowell Mfg. Co.* v. *Safeguard Fire Ins. Co.*, 88 N. Y. 591; *Hankinson* v. *Vantine*, 152 N. Y. 20, 46 N. E. 292; *Iron Co.* v. *Green*, 31 C. C. A. 447,

88 Fed. 207; *Reynolds* v. *Magness*, 24 N. C. 30; *Dunn* v. *Price*, 112 Cal. 46, 44 Pac. 354.

"* * * *We think, that the rule of exclusion does not apply between a party to the contract and a stranger*, and improperly assuming that a joint tort feasor is a party to the contract.

"We are of opinion that the plaintiff in error *should have been permitted to show the real agreement*, and that the question *should have been submitted to the jury whether the written paper* expressed the actual contract of the parties. The *judgment is reversed*, and the cause remanded, with directions to award a new trial."

The above cases show that it was reversible error for Judge Briggle to reject the evidence contained in the Answer on the Facts (R. 230-268) and in the Offer of Proof (R. 239, Par. 56).

VIII.

PRACTICALLY ALL STATES REFUSE RELEASE TO WRONGDOERS IF INTENTION IS TO THE CONTRARY.

The Overwhelming Weight of Authority Holds That the Intent of the Parties Not to Release Joint Tort Feasors Will Be Given Effect, and They Will Not Be Released Regardless of the Language Used.

This is established by the Restatement of Torts (1939), Section 885, approved by the Circuit Court of Appeals at the case at bar. It states as follows:

"(1) A valid release of one tort-feasor from liability for a harm, given by the injured person, discharges all others liable for the same harm, *unless the parties to the release agree that the release shall not discharge the others and, if the release is embodied in a document, unless such agreement appears in the document.*"

In its "Comment", the Restatement, in referring to the old rule which discharged others irrespective of the intent of the parties, states:

> "It frequently resulted in the unintended and unpaid-for discharge of one of the tort-feasors. The rule is not consistent with the modern American point of view."

The leading cases from other jurisdictions are as follows:

Steenhuis v. *Holland*, 217 Ala. 105, 115 So. 2 (1927).

Mahaffey v. *Glover*, 184 Ark. 1159, 45 S. W. 2d 521.

American Nat. Bk. v. *Duer*, (Cal.) 117 Pac. 2d 405 (1941)

Kinchloe v. *Retail Credit Co.*, (Cal.) 46 Pac. 2d 971 (1935).

Cowles v. *Independent El. Co.*, 22 Cal. App. 109, 70 Pac. 2d till (1937).

Dwy v. *Connecticut*, 89 Conn. 74, 92 Atl. 883.

Balick v. *Phila. Dairy Prod. Co.*, 35 Del. 269, 162 Atl. 776 (1932).

Parry Mfg. Co. v. *Crull*, 56 Ind. App. 77, 101 N. E. 756 (1914).

Ryan v. *Becker*, 111 N. W 426 (Iowa, 1907).

Snyder v. *Mutual Tel. Co.*, 135 Iowa 215, 112 N. W. 776 (1907).

Edens v. *Fletcher*, 79 Kan. 139, 98 Pac. 784.

City of Topeka v. *Brooks*, 99 Kan. 643, 164 Pac. 285.

Feighley v. *Hoffman*, 100 Kan. 430, 165 Pac. 276.

L. & E. Mail Co. v. *Barnes*, 117 Ky. 860, 79 S. W. 261 (1904).

Landry v. *New Orleans Pub. Serv.*, 177 La. 105, 147 So. 698 (1933).

Hale v. *Spaulding*, 14 N. E. 534 (Mass.).

Matheson v. *O'Kane*, 211 Mass. 91, 97 N. E. 638 (1912).

American Rwy. Exp. Co. v. *Stone,* (C. C. A. 1, 1928) 27 F. 2d 8 (Mass.).

Murphy v *Penniman,* 66 Atl. 828 (Md., 1907).

Cook v. *City Transp. Co.,* 272 Mich. 91, 261 N. W. 257 (1935).

Slinkard v. *Nat'l. Mach. Co.,* 274 Mich. 662, 265 N. W. 494 (1936).

Joyce v. *Mass. R. E. Co.,* 173 Minn. 310, 217 N. W. 337 (1928).

Gulf Ref. Co. v. *Ferrell,* 165 Miss. 296, 147 So. 476 (1933).

McKim v. *Metropolitan St. Ry. Co.,* (Ct. of App. Mo.) 196 S. W. 433 (1917).

Black v. *Martin,* 88 Mont. 256, 292 Pac. 577.

Fitzgerald v. *Union Stockyards Co.,* 89 Neb. 393, 131 N. W. 612 (1911).

Carpenter v. *McElwain,* 78 N. H. 118, 97 Atl. 560.

Colby v. *Walker,* 86 N. H. 568, 171 Atl. 774.

Roseville Trust v. *Mott,* 85 N. J. Eq. 297, 96 Atl. 402.

LaMonte v. *Lurich,* (N. J.) 100 Atl. 1031.

Gilbert v. *Finch,* 173 N. Y. 455, 66 N. E. 133.

Adams Exp. Co. v. *Beckwith,* 100 Ohio St. 348, 126 N. E. 300.

Bland v. *Lawyer-Cuff Co.,* 72 Okla. 128, 178 Pac. 885.

Baldwin v. *Ely,* 127 Pa. Sup. 110, 193 Atl. 299 (1937).

Insuranceshares Corp. v. *Northern Fiscal Corp.,* (D. C. Pa., 1940) 35 F. Supp. 22.

In *Carey* v. *Bilby,* (C. C. A. 8) 129 Fed. 203 (a tort case), where the Court held that *effect must be given to a reservation in a release.* At page 205, the Court said:

"We are of the opinion that the doctrine enunciated in the cases last cited is supported by the *greater*

weight of authority, and is founded upon the better reasons.

"It has the merit of giving *effect to the intention of the party* who executes such an instrument, *which should always* be done when the intention is manifest and it can be given *effect without* violating any rule of law, morals, *or public policy.*

"Besides we are not aware of any sufficient reason which should *preclude* a person who has sustained an injury through the wrongful act of several persons from *agreeing* with one of the wrongdoers, who desires to *avoid* litigation, to accept such sum by way of *partial* compensation for the injury as he may be willing to pay, and to *discharge* him further from liability without *releasing* his cause of action as against the other wrongdoers.

"The law favors compromises generally, and it is not perceived that an arrangement of the kind last mentioned should be regarded with disfavor."

In *Adams* v. *Beckwith,* 100 Ohio St. 348, 176 N. E. 300, 1919, the plaintiff gave covenants not to sue to two railroads expressly reserving her rights against the Adams Express Co. The latter *contends this was a release of* joint tort-feasors and therefore should release it also, *relying on Ellis* v. *Bitzer,* 2 Ohio 89, 15 Am. Dec. 534.

The Court said:

"A decided case is *worth as much as it weighs in reason and righteousness, and no more.* It is not enough to say 'thus saith the court.'

"Now, where it is charged that two or more persons have committed a wrong against another, the question arises, *may one of these persons buy his peace,* settle all claims for damages made against him, solely for his own benefit and his own release, leaving or reserving all questions as to the liability of others for independent and later determination? *Why not?* What principle of law, of reason or righteousness, what primary element of justice, is violated by such a proceeding, save the dictum of some court?

And at page 302:

> "Upon what principle the court (*Ellis* v. *Bitzer*) took a contract between the parties, which was in *plain, definite,* and *unambiguous* terms, and wrote into that contract not only what it *did not contain* but what the contract expressly said it should not contain, is beyond understanding. It emphasizes the importance of a release without a complete satisfaction and *extinguishes* a right without such satisfaction.
>
> "There is neither *reason, rhyme, nor righteousness in such a course of reasoning,* if it *may be called reasoning at all.* There is nothing peculiar or exceptional about contracts of release, or contracts not to sue, or contracts to cease prosecuting a suit. They are presumably to be construed, if in doubt, by the same rules of arriving at the intention of the parties as any other kinds of contract.
>
> "But courts *unfortunately have too often* not only disregarded the intention of the parties in such kinds of contracts, but have made new contracts for the parties squarely contrary to what the parties themselves intended. The *Bitzer* case is therefore disapproved."

And also at page 302:

> "The parties themselves reserved the right to sue the Adams Express Company. **It is an odd species of legal legerdemain whereby a court can destroy that reservation,** that plain provision in the agreement of the parties."

At page 302, the Court remarked that "it is of interest to note that at least *two other courts* of last resort have announced and followed the *more humane* and *reasonable doctrine,*" and then proceeded to quote at length the syllabus from the *Connecticut* case of *Dwy* v. *Connecticut Co.,* 89 Conn. 74, 92 Atl. 883, and from the *Illinois* case of *City of Chicago* v. *Babcock,* 143 Ill. 358, 32 N. E. 271. With reference to the *Dwy* case, the Court said, at page 303:

> **"The doctrine here announced is so sensible and**

salutary that it is hard to understand how any court intent upon justice could follow any other rule.

"His line of reasoning is not unlike that of the immortal J. N., who used to insist upon special rates and privileges at the hotels. It was said that upon numerous occasions he induced the landlord by his persuasive art to reduce the bill one-half, whereupon he would reply 'I shall not be outdone by your generosity, and I shall therefore throw off the other half'."

It will thus be seen that the highest Court of Ohio believed that the case of *City of Chicago* v. *Babcock* (*supra*), also a tort case, is authority for the established law of Illinois in *tort cases* which we contend for.

This, Adams, case appears to be squarely on all fours with practically every crucial legal question in the case at bar.

Its holdings are just plain common sense.

In Michigan, at the time of the decisions cited by defendants, not even *a covenant not to sue* was recognized. However, in 1935, in the case of *Cook* v. *City Transportation Company*, 272 Mich. 91, that state also joined the ranks of those following the modern view of giving effect to the intention of the parties. At page 220, the court said:

"The *distinction* between a release and an agreement not to sue *is fine spun and seems overtechnical.* However, the whole law of joint tort-feasors is of *like character* and, as indicated by Mr. Justice Potter, the *overwhelming weight of authority draws the distinction* and denies the effect of an agreement not to sue one as a release of other joint tort-feasors. * * *

"I think we should follow *the weight of authority*, not because I approve *the distinction, except as a mental exercise*, but *because* such effect of an agreement not to sue *offers a way for a party to buy his peace* and allows an opportunity to compromise a doubtful claim without requiring an injured party to forego

the right of full compensati ion against *known wrong-doers.*" (Italics supplied.)

This case therefore overrules the Michigan cases cited by the defendants.

Respondents' Citations Are U nsound and Inapplicable in a Court of Equity.

Citations Distin guished.

Respondents devote themselve s to spurious argumentation based on unsound, harsh, anomalous, overruled or ancient common law decisions (or dicta) found in nine states outside of Illinois, in the past 100 years. These common law cases bear no apt re semblance to the situation, or to the facts here.

By collecting such citations e n masse, multiplying and magnifying them by constant re petitions, and adding the result, it is asserted, that respond ents "are fully supported by the established law and soun l logic;" (Resp. Brief, p. 12, 21 et seq.)

We respectfully submit that such citations are contrary to the overwhelming wei ght of present authority. They are contrary to the more enlightened principles of equity and law that now prevail in Illinois and in 47 other states, and in the federal courts.

Defendants are absolutely wr ong in claiming that the ancient theory on which they re ly is followed in the majority of American jurisdictions. The contrary is shown in the Restatement of Torts, (19 39) Section 885, which is referred to with approval by the Court of Appeals in the case below.

> "(1) A valid release of o ne tort-feasor from liability for a harm, given by the injured person, discharges all others liable for the same harm, unless the parties to the release agree that the release shall not discharge the others and, if the release is embodied in a document unless such agreement appears in the document."

In the case at bar there was no "Release Document." The Reservation was part of the Agreement; it was expressed and embodied in the Petition for Decretal Order, in the Notice to Debenture Holders, in the letters of explanation to them, and in the Findings of Fact and in the Decree which referred to it.

In none of the cases cited by respondents was there (1) *any evidence of any reservation* or (2) *any evidence of any intention of the parties not to release others,* or (3) an affirmative showing that full compensation had not been paid to the releasor.

IX.

THERE IS NO CASE IN ILLINOIS RELEASING A JOINT TORT-FEASOR, WHICH CONTAINED ANY RESERVATION OF THE CHARACTER IN THIS CASE.

There is no case in Illinois to release a joint tort-feasor or joint wrongdoer in any case remotely resembling the case at bar.

Vigent v. *Scully,* 35 Ill. App. 44 is the principal case relied on by the respondents. They cite and quote it over and over again,—six times. It has absolutely no application here, since it appeared that the injured party had received full satisfaction.

No question of intention *not to* release, was involved in the case.

The Vigent case relies on *Ellis* v. *Bitzer,* 2 Ohio 89. That case has also been expressly overruled in Ohio.

Stanley v. *Leahy,* 87 Ill. App. 465 has been completely distinguished as wholly inapplicable in our supporting brief to Petition for Certiorari, pages 28 and 29.

There was no evidence of any intention by both parties to reserve any other cause of action.

In *Brown* v. *Cambridge*, 85 Mass. 474, the plaintiff gave a formal written release *without* any reservation.

The Massachusetts rule recognized reservation and in the *Brown* case held there was insufficient evidence thereof.

However, the *Brown* case does hold that if *there had been a reservation or evidence of any intention to reserve*, the other joint tort-feasor would not have been discharged.

This holding of the *Brown* case as standing for the doctrine that, under such circumstances, there *would be no release* of a joint tort-feasor is approved in *American Ry. Express Co.* v. *Stone*, decided June 28, 1928, 27 Fed. (2d) 8. That case cites *Brown* v. *Cambridge* as well as *Muse* v. *Vito*, 243 Mass. 384 (another case relied on by respondents as holding the following proposition):

> "The decisions of the Supreme Judicial Court of Massachusetts hold that a release, although not under seal, gives to one joint tort-feasor discharges all, provided it is absolute and unconditional, and is *not simply a covenant not to sue the party released, and there is no evidence of a reservation to sue other joint tort-feasors.*" (Italics ours.)

Ellis v. *Bitzer*, 2 Ohio 89 is cited in *Vigent* v. *Scully*, 35 Ill. App. 44 only under the general proposition of a release of one and all. *Ellis* v. *Bitzer* is not the present law in Ohio, as it has been expressly overruled in *Adams Express Co.* v. *Beckwith*, 100 Ohio St. 348, 126 N. E. 300, discussed *supra*.

Petroyeanis v. *Pirola*, 205 Ill. App. 310 was overruled in effect by the later case of *Van Meter* v. *Gurney*, 251 Ill. App. 184 involving substantially similar facts.

The *Van Meter* case was based upon *Parmelee* v. *Lawrence*, 44 Ill. 415, and the cases following it.

In the *Van Meter* case the Court uses this language: "it requires some *artificiality in reasoning to avoid giving effect to the intention of the parties* in the instant case, where this intention is expressed as clearly as language is capable of expression."

Conclusion.

Defendants have failed to show any valid reason why certiorari should not be granted.

This case is limited to the questions arising under the erroneous summary judgment which defendants obtained under Rule 56. The additional grounds urged by defendants have no application to that summary judgment which adjudicated only that plaintiffs are barred from maintaining this suit because of the so-called bank settlement.

It is clear that the decision of the Circuit Court of Appeals conflicts with the established Illinois law and equity which governs.

We respectfully and humbly repeat the Prayer of Our Petition.

Respectfully submitted,

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